(21,230.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 179.

JOHN STOFFELA, APPELLANT,

vs.

M. J. NUGENT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Exhibit A—Deed between Magdalena C. Heyl and husband and M. J. Nugent, January 4, 1905	5	3
B—Deed between Ben C. Heyl *et ux.* and John Stoffela, January 9, 1905	9	4
C—Deed between Ben C. Heyl *et ux.* and John Stoffela, January 9, 1905	12	6
Amended complaint	17	8
Exhibit A—Deed between Magdalena C. Heyl and husband and M. J. Nugent, January 4, 1905	22	10
B—Deed between Ben C. Heyl *et ux.* and John Stoffela, January 9, 1905	25	12
C—Deed between Ben C. Heyl *et ux.* and John Stoffela, January 9, 1905	28	13
Summons	33	16
Sheriff's return	34	16
Demurrer to complaint	35	17
Answer to complaint	35	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 20, 1909.

	Original.	Print.
Cross-complaint	41	21
Demurrer to cross-complaint	43	21
Answer to cross-complaint	43	21
Findings of fact	45	22
Conclusions of law	49	24
Judgment	52	25
Plaintiff's Exhibit A—Deed between Magdalena C. Heyl and husband and M. J. Nugent, Jan. 4, 1905.	55	26
B—Agreement between M. J. Nugent and Louis Levy *et al.*, January 4, 1905	59	28
C—Local item from "Yuma Sun," January 6, 1905	62	29
Defendant's Exhibit 1—Deed between Ben C. Heyl *et ux.* and John Stoffela, January 9, 1905	63	29
2—Deed between Ben C. Heyl *et ux.* and John Stoffela, January 9, 1905	67	31
3—Letter of John Stoffela to the treasurer of Yuma county, January 9, 1905, &c.	72	34
Notice of appeal	73	34
Bond on appeal	75	35
Clerk's certificate	78	37
Order passing cause and setting demurrer	79	37
Order setting cause for hearing	79	37
Order overruling demurrer to cross-complaint	80	38
Order overruling demurrer to complaint	80	38
Order beginning trial, &c	80	38
Judgment	82	39
Notice of appeal	84	40
Remittitur from supreme court of Arizona	86	40
Transcript of evidence	88	41
Testimony of J. L. Redondo	89	42
John Stofella	92	44
P. B. Hodges	118	56
Magdalena C. Heyl	121	58
Ben C. Heyl	130	63
Offer of documentary evidence, &c	141	68
Testimony of Ben C. Heyl (recalled)	142	69
C. L. Brown	145	70
A. M. Foster	149	73
C. L. Brown (recalled)	151	74
M. J. Nugent	170	83
Louie Levy	178	87
L. W. Alexander	182	89
John Stofella (recalled)	190	93
Thos. D. Molloy	190	93
Henry Levy	192	94
John Stofella (recalled)	194	95
F. M. Riley	200	99
Stipulation as to proceedings	202	99
Stenographer's certificate	203	100
Motion to dismiss appeal	205	101
Memorandum in opposition to motion to dismiss appeal	207	102
Affidavit of Eugene S. Ives	211	103

	Original.	Print.
Affidavit of Thomas D. Molloy, clerk	214	105
Certificate of Thomas D. Molloy, clerk	216	106
Opinion	217	106
Motion for rehearing	225	111
Appeal bond	226	111
Assignment or errors	229	113
Order submitting motion to dismiss	231	114
Order granting oral argument	231	114
Order resetting cause	232	114
Order granting time to make showing as to approval of appeal bond	233	115
Order denying motion to dismiss	233	115
Argument and submission	234	116
Judgment	234	116
Order submitting motion for rehearing	235	116
Order denying motion for rehearing	236	117
Notice of appeal	236	117
Clerk's certificate	237	117
Order extending time to file record	238	118
Citation	239	118
Proof of service of citation	240	118

a In the Supreme Court of the Territory of Arizona.

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

Transcript of Record.

1 In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Yuma.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

For cause of action plaintiff complains and alleges:

First. That plaintiff and defendant are both residents of Yuma County, Arizona Territory.

Second. That on January 4th, A. D., 1905, and for a long time prior thereto, one Magdalena C. Heyl, formerly Magdalena C. Levy was the owner of and in the possession of the following described real property as her separate and individual estate, to-wit:

Lot one in block twenty-one and lot four in block fifteen, all in the town of Yuma, County of Yuma, Territory of Arizona, according to White's official survey of said town of Yuma.

Third. That on said 4th day of January A. D., 1905, the said Magdalena C. Heyl, for a valuable consideration to her in hand paid by the plaintiff herein, sold and conveyed to M. J. Nugent, the plaintiff herein, by a good and sufficient deed in writing all of the aforesaid real property, a copy of which deed is hereunto
2 annexed, marked "Exhibit A", and made a part of this complaint, and that plaintiff ever since has been the owner and entitled to the possession of all of said real property.

Fourth. That thereafter, to-wit, on the 9th day of January A. D., 1905, the said defendant, well knowing that the plaintiff herein had purchased all of said real property and was the owner thereof and entitled to the possession thereof, made a pretended purchase of a part of said property to-wit: Lot Four in block fifteen, from the said Magdalena C. Heyl and Ben C. Heyl, her husband, and induced them the said Magdalena C. Heyl and Ben C. Heyl, to make and deliver to him their deed in writing therefor, a copy of which deed is hereunto attached, marked "Exhibit B", and made a part hereof, and on said 9th day of January, A. D., 1905, he the said defendant caused said deed to be filed for record in the office of the recorder of Yuma County, Arizona Territory.

Fifth. That the said defendant on the 9th day of January, A. D., 1905, well knowing that the plaintiff herein, had purchased all of

said real property and was the owner thereof and entitled to the possession thereof, induced the said Magdalena C. Heyl and Ben C. Heyl to execute and deliver to him a mortgage upon a part of said real property to-wit, lot one in block twenty-one in the sum of $5700, in writing, and that on said 9th day of January, A. D., 1905,
3 he the said defendant caused the said mortgage to be filed for record with the recorder of Yuma County, Arizona Territory, a copy of which mortgage is hereunto attached, marked "Exhibit C", made a part hereof.

Sixth. That said deed and said mortgage made by said Magdalena C. Heyl and Ben C. Heyl, and filed for record as aforesaid is a cloud upon the title of plaintiff's property aforesaid and made by said Magdalena C. Heyl and Ben C. Heyl without right or shadowy of right, whatever and said defendant when he caused said Magdalena C. Heyl and Ben C. Heyl to execute and deliver to him said deed and mortgage well knew that the said Magdalena C. Heyl and Ben C. Heyl had no title or color of title to said property or any part thereof, and that any money or any valuable thing that the said defendant may have paid to the said Magdalena C. Heyl and Ben C. Heyl or either of them for said deed and mortgage was paid with the full knowledge that they, the said Magdalena C. Heyl and Ben C. Heyl nor either one of them, had no right to receive said money or valuable thing from the defendant therefor or to make said deed or said mortgage.

Wherefore plaintiff prays judgment as follows:

That said deed and mortgage be cancelled and declared to be of no effect whatever and that said defendant, John Stofella, or any one claiming under him has no right, title, claim, or interest in, to or upon said property, nor any part thereof, and for cost of this
4 action.

C. L. BROWN,
Attorney for Plaintiff.

TERRITORY OF ARIZONA,
County of Yuma, ss:

M. J. Nugent first being duly sworn on his oath says that he is the plaintiff in the above action; That he has heard read the following complaint, and know- the contents thereof; that said complaint is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters, he believes it to be true.

M. J. NUGENT.

Subscribed to and sworn before me this 9th day of January, 1905.

[SEAL.] THOS. D. MOLLOY,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

5 EXHIBIT A.

Quit-claim Deed.

This indenture, made the Fourth day of January in the year of our Lord One Thousand Nine Hundred and Five between Magdalena C. Heyl formerly Magdalena C. Levy, and Ben C. Heyl, her husband, the parties of the first part, and M. J. Nugent, the party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of Fifteen Thousand Four Hundred Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and quit-claim unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest, claim and demand which the said parties of the first part have in and to the following described real estate and property situated in the County of Yuma, and Territory of Arizona, to-wit:

Lot one (1) in Block Twenty One (21) and lot Four (4) in Block Fifteen (15) all in the town of Yuma, according to White's official survey of said town of Yuma.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise appertaining, and all the estate, right, title, interest and claim whatsoever, of said parties of the first part, either in law or equity,
6 in possession of expectancy, to the only proper use, benefit and behoof of the party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

MAGDALENA C. HEYL.

Signed and Delivered in the presence of
—— ——.

TERRITORY OF ARIZONA,
County of ——:

Before me, —— —— a Notary Public in and for the County of —— Territory of Arizona, on this day personally appeared —— —— known to me to be the person — whose name — subscribed to the foregoing instrument, and acknowledged to me that — executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this — day of —— A. D. 190-.

—— ——,
Notary Public.

My commission expires —.

7 TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, J. L. Redonda, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Magdalena C. Heyl wife of said Ben C. Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 4th day of January A. D., 1905.

[SEAL.] J. L. REDONDO,
Notary Public.

My commission expires Jan. 5th, 1905.

TERRITORY OF ARIZONA,
County of —:

I, —— ——, County Recorder in and for the County and Territory aforesaid, do hereby certify that the within instrument was filed for record at — o'clock — M. on this — day of —— 190-, and duly recorded in Book No. — of — Records of —— County, Arizona, at pages —.

Witness my hand and official seal the day and year above written.

—— ——,
County Recorder.

8 (Endorsed:) Quit-claim deed. From Magdalena C. Heyl and husband to M. J. Nugent. Dated Jan. 4, 1905. Filed and recorded at request of M. J. Nugent, Jan. 9, 1905, at 2:30 P. M. Book —, Page —. J. M. Polhamus, County Recorder.

9 EXHIBIT B.

Bargain and Sale Deed.

This indenture, Made the ninth day of January in the year of our Lord, One Thousand Nine Hundred and Five, between Ben C. Heyl and Magdalena C. Heyl, his wife, parties of the first part, and John Stoffela, the party of the second part, witnesseth: That the said parties of the first part for and in consideration of the sum of Ten Thousand (10,000.00/) no/100 Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land, situate, lying and being in the County of Yuma, Territory of Arizona, and bounded and described as follows, to-wit:

Being all of Lot Number Four (4) in Block Number Fifteen (15) of the village of Yuma, County of Yuma, Territory of Arizona, as per White's official survey of said village. Together with all and

singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and, also, all the estate, right, title, interest, claim of homestead, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the
10 appurtenances.

To have and to hold, all and singular, the above described premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said part— of the first part ha— hereunto set — hand-- and seal— the day and year first above written.

BEN C. HEYL. [SEAL.]
MAGDALENA C. HEYL. [SEAL.]

Signed, Sealed and Delivered in the presence of—
—— ——.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Ben C. Heyl known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 9th day of January, A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10", 1907.)

11 TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Magdalena C. Heyl, wife of said Ben C. Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 9th day of January, A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10th, 1907.)

(Endorsed:) No. —. Bargain and Sale Deed. Long form. From Ben C. Heyl & wife to John Stoffea. Dated Jan. 9, 1905. Filed and recorded at request of John Stoffea Jan. 9, A. D., 1905, at 11 A. M. Book —. Pages —. J. M. Polhamus, County Recorder.

12 EXHIBIT C.

Realty Mortgage.

Know all men by these presents:

That Ben C. Heyl and Magdalena C. Heyl, his wife, Mortgagor- of Yuma, County of Yuma, Territory of Arizona, for and in consideration of Five Thousand Seven Hundred Dollars ($5,700.00) *Dollars,* to us in hand paid by John Stoffela, same place Mortgagee, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said John Stoffela all that certain premises described as follows, to-wit: All of Lot one (1) Block twenty one (21) of the village of Yuma, County of Yuma, Territory Arizona, as per White's official survey of said village, except that part decreed Eulalia Casares for the term of her natural life, the same being a part of the records of the Probate Court, Yuma County, in the matter of the will of Isaac Levy, deceased.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said John Stoffela, Mortgagee heirs and assigns forever.

This Conveyance is intended as a Mortgage to secure the payment of a certain Promissory Note, given by Ben C. Heyl and Magdalena C. Heyl to John Stoffela of date January 9th, 1905, which said note is in words and figures following, to-wit:

13 YUMA, A. T., *Jan'y* 9/1905.

Three years after date or before for value received, we promise to pay to order of John Stoffela Five Thousand Seven Hundred Dollars ($5,700.00) U. S. gold coin at his place of business in the village of Yuma, Yuma County, A. T., with interest of one per cent (1%) per month in like coin from date until paid, interest to be paid monthly and if not paid when due to become as principal and bear the same rate of interest. The makers of this note waive presentment for payment, notice of non-payment, protest and notice of protest, and consent that time of payment may be extended without notice thereof and waive all exce*m*ptions that may be allowed by law.

(Sig'd) BEN C. HEYL.
(S'g'd) MAGDALENA C. HEYL.

And the said mortgagors agree & do hereby covenant to keep the business thereon insured in favor of the mortgagee in a good company to be selected by the mortgagee in a sum not less than Three Thousand Dollars during the life of this mortgage and in case said mortgagors fail to secure said insurance, the mortgagee is hereby authorized to procure the same. In case of loss by fire or other cause of the buildings covered by this insurance, the mor*tag*ee shall retain all amo-nts due on insurance as part judgment of this mortgage.

And this instrument shall be void if said Promissory Note, prin-

cipal and interest, be well and truly paid when due, accord-
14 ing to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said Promissory Note, or the principal thereon, shall not be punctually paid when the same shall become due, as in said Promissory Note mentioned, then, and in such case, the principal sum of said Note, and the interest thereon, shall be deemed and taken to be wholly due, at the option of the holder, and payable, and proceedings may forthwith be had by the said Mortgagee John Stoffela heirs, executors, administrators and assigns, for the recovery of the same, either by suit on said Note or on this Mortgage and Note; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said Mortgagee his heirs, executors, administrators or assigns, to include in the judgment that may be recovered attorney's fees not exceeding fifteen per cent thereon upon the amount found due the plaintiff on said Note and this Mortgage, or in case of settlement after suit brought, but before judgment rendered, then ten per cent on amount found due at the time of settlement, as well as all payments that the said Mortgagee his heirs, executors, administrators or assigns may be obliged to make for his security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

Witness our hands this ninth day of January, A. D. 1905.

15 BEN C. HEYL. [SEAL.]
MAGDALENA C. HEYL. [SEAL.]

Signed, Sealed and Delivered in the presence of

—— ——.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Ben C. Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 9th day of Jan. A. D., 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10, 1907.)

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Magdalena C. Heyl, wife of said Ben C. Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and

acknowledged to me that she executed the same for the purposes and consideration therein expressed.

16 Given under my hand and seal of office this 9th day of Jan'y, A. D., 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10, 1907.)

(Endorsed:) No. — Realty Mortgage. From Ben C. Heyl & Wife to John Stoffela. Dated Jan. 9th, 1905. Filed and recorded at request of John Stoffela Jan. 9th, 1905, at 11:10 A. M. Book — Pages —. J. M. Polhamus, County Recorder. No. 891. In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Yuma. M. J. Nugent, Plaintiff vs. John Stoffela, Defendant. Complaint. Filed this 9th day of Jan. A. D., 1905 at 0 minutes after 4 o'clock P. M. Thos. D. Molloy, Clerk.

17 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Yuma.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

For cause of action plaintiff complains and alleges:

I.

That plaintiff and defendant are both residents of Yuma County, Arizona Territory.

II.

That on January 4", 1905, and for a long time prior thereto, one Magdalena C. Heyl, formerly Magdalena C. Levy, was the owner of and in the possession of the following described real property as her separate and individual estate, to-wit:

Lot one in block twenty-one, and lot four in block fifteen, all in the town of Yuma, County of Yuma, Territory of Arizona, according to White's official survey of said town of Yuma.

III.

That on said 4" day of January, 1905, the said Magdalena C. Heyl, for a valuable consideration to her in hand paid by the plaintiff herein, sold and conveyed to M. J. Nugent, the plaintiff therein, by a good and sufficient deed in writing all of the aforesaid real

18 property, a copy of which deed is hereunto annexed, marked "Exhibit A," and made a part of this complaint, and that plaintiff ever since has been the owner in fee simple and entitled to the possession of all of said real property.

IV.

That thereafter, to-wit, on the 9" day of January, 1905, the said defendant, well knowing that the plaintiff herein had purchased all of said real property and was the owner thereof and entitled to the possession thereof, made a pretended purchase of a part of said property, to-wit, Lot 4 in Block 15, from the said Magdalena C. Heyl and Ben C. Heyl, her husband, and induced them the said Magdalena C. Heyl and Ben C. Heyl, to make and deliver to him their deed in writing therefor, a copy of which deed is hereunto attached, marked "Exhibit B," and made a part hereof, and on said 9" day of January, 1905, he, the said defendant caused said deed to be filed for record in the office of the Recorder of Yuma County, Arizona Territory.

V.

That the said defendant on the 9" day of January, 1905, well knowing that the plaintiff therein had purchased all of said real property and was the owner thereof and entitled to the possession thereof, induced the said Magdalena C. Heyl and Ben C. Heyl to execute and deliver to him a mortgage upon a part of said real property, to-wit, lot 1 in block 21 in the sum of $5700., in writing, and that
19 on said 9" day of January, 1905, he, the said defendant, caused the said mortgage to be filed for record with the recorder of Yuma County, Arizona Territory, a copy of which mortgage is hereunto attached, marked "Exhibit C," made a part hereof; and that the said defendant claims an estate and interest in the said premises under and by virtue of the said deed and mortgage, (Exhibits B & C) adverse to the plaintiff.

VI.

That said deed and said mortgage made by said Magdelena C. Heyl and Ben C. Heyl, and filed for record as aforesaid is a cloud upon the title of plaintiff's property aforesaid, and made by said Magdelena C. Heyl and Ben C. Heyl without right or shadow of right whatever, and said defendant when he caused said Magdalena C. Heyl and Ben C. Heyl to execute and deliver to him said deed and mortgage, well knew that the said Magdalena C. Heyl and Ben C. Heyl had no title or color of title to said property or any part thereof and that any money or any valuable thing that the said defendant may have paid to the said Magdalena C. Heyl and Ben C. Heyl, or either of them for said deed and mortgage, was paid with the full knowledge that they, the said Magdalena C. Heyl and Ben C. Heyl, nor either one of them, had no right to receive said money or valuable thing from the defendant therefor or to make said deed or said mortgage.

Wherefore Plaintiff prays judgment as follows:

20 1. That the title of the plaintiff to the said lands in fee simple and the right of the plaintiff to the possession thereof be established.

2. That said deed and mortgage be cancelled and declared to be of no effect whatever, and that said defendant, John Stoffela, or any-

one claiming under him has no right, title, claim nor interest in, to or upon said property, nor any part thereof, and that the defendant be forever barred and estopped from having or claiming any right or title in the said premises adverse to the plaintiff, and for cost of this action.

C. L. BROWN AND
EUGENE S. IVES,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA,
County of —, ss:

C. L. Brown first being duly sworn, on his oath says: that he is one of the attorneys for the plaintiff in the above action; that he has read the foregoing complaint and knows the contents thereof; that said complaint is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true; that plaintiff is absent from Yuma County and affiant knows the facts in regard to said action as well as the plaintiff.

C. L. BROWN.

21 Subscribed and sworn to before me this 7th day of February, 1905.

My commission expires June 17th, 1907.

[SEAL.] THOS. D. MOLLOY,
Notary Public.

22 "EXHIBIT A."

Quit-Claim Deed.

This indenture, Made the Fourth day of January in the year of our Lord One Thousand Nine Hundred and Five between Magdalena C. Heyl, formerly Magdalena C. Levy, and Ben C. Heyl, her husband, the parties of the first part, and M. J. Nugent the party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of Fifteen Thousand Four Hundred Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and quit-claim unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest, claim, and demand which the said parties of the first part have in and to the following described real estate and property situated in the County of Yuma, and Territory of Arizona, to-wit:

Lot One (1) in Block Twenty One (21) and lot Four (4) in Block Fifteen (15), all in the town of Yuma, according to White's official survey of said town of Yuma.

To have and to hold the same, together with all and singular the

appurtenances and privileges thereunto belonging, or in any-
23 wise appertaining, and all the estate, right, title interest and claim whatsoever, of the said parties of the first part, either in law or equity, in possession or expectancy, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

MAGDALENA C. HEYL. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Signed and Delivered in the presence of
—— ——.

TERRITORY OF ARIZONA,
County of ——, *ss:*

Before me —— ——, a Notary Public in and for the County of —— Territory of Arizona, on this day personally appeared —— —— known to me to be the person — whose name — subscribed to the foregoing instrument, and acknowledged to me that — executed the same for the purpose — and consideration therein expressed.

Given under my hand and seal of office, this — day of ——, A. D. 190–.

—— ——,
Notary Public.

(My Commission expires —— —.)

24 TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me J. L. Redondo a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Magdalena C. Heyl wife of said Ben C. Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 4th day of January, A. D. 1905.

[SEAL.] J. L. REDONDO,
Notary Public.

(My Commission expires Jan. 5, 1905.)

(Endorsed:) Quit-Claim Deed. From Magdalena C. Heyl and husband to M. J. Nugent. Dated Jan. 4, 1905. Filed and Recorded at request of M. J. Nugent. Jan. 9, A. D. 1905, at 2:30 P. M. Book —, Pages —. J. M. Polhamus, County Recorder.

25 "EXHIBIT B."

Bargain and Sale Deed.

This indenture, Made the ninth day of January in the year of our Lord, One Thousand Nine Hundred and Five, between Ben C. Heyl and Magdalena C. Heyl, his wife, parties of the first part, and John Stoffela, the party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of ten thousand ($10,000.00) dollars lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents bargain, sell, convey and confirm unto the said party of the second part and to his heirs and assigns forever, all that certain lot, piece, or parcel of land, situate, lying and being in the County of Yuma, Territory of Arizona, and bounded and described as follows, to-wit:

Being all of lot Number Four (4) in Block Number Fifteen (15) of the village of Yuma, County of Yuma, Territory of Arizona as per White's official survey of said village.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof; and, also, all the estate, right, title, interest, claim of homestead, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the said premises, and every part

26 and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the above described premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seal the day and year first above written.

BEN C. HEYL.
MAGDALENA C. HEYL.

Signed, sealed and delivered in the presence of

____ ____.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Ben C. Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 9th day January, A. D. 1905.

[SEAL.]

FRANK BAXTER,
Notary Public.

My commission expires July 10th, 1907.

27 TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Magdalena C. Heyl wife of Ben C. Heyl known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 9th day of January, A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

My commission expires July 10th, 1907.

(Endorsed:) Bargain & sale deed. From Ben C. Heyl and Magdalena C. Heyl, his wife to John Stoffela. Dated Jan. 9th, 1905. Filed and recorded at request of John Stoffela Jan. 9th, A. D. 1905, at 11:10 A. M. Book —, Pages —. J. M. Polhamus, County Recorder.

28 "EXHIBIT C."

Realty Mortgage.

Know all men by these presents: That Ben C. Heyl and Magdalena C. Heyl his wife, Mortgagor- of Yuma County of Yuma Territory of Arizona, for and in consideration of Five thousand seven hundred dollars ($5700.00) *Dollars* to us in hand paid by John Stoffela, same place Mortgagee, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said John Stoffela all that certain premises described as follows, to-wit:

All of Lot one (1) Block twenty one (21) of the village of Yuma, County of Yuma, Territory Arizona, as per White's official survey of said village, except that part decreed Eulalia Casares for the term of her natural life, the same being a part of the records of the Probate Court, Yuma County in the matter of the will of Isaac Levy, deceased.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said John Stoffela Mortgagee his heirs and assigns forever.

This Conveyance is intended as a Mortgage to secure the payment of a certain Promissory Note given by Ben C. Heyl and Magdalena C. Heyl to Josh Stoffela of date January 9th 1905 which said — in words and figures following, to-wit:

29 YUMA, A. T., *Jan'y* 9, 1905.

Three years after date or before for value received we promise to pay to order of John Stoffela Five thousand seven hundred dollars ($5700.00) U. S. Gold Coin at his place of business in the village

of Yuma, Yuma Co., A. T., with interest of one — cent (1%) per month in like coin from date until paid interest to be paid monthly and if not paid when due to become as principal and bear the same rate of interest. The makers of this note waive presentment for payment notice of non-payment, protest & notice of protest and consent that time of payment may be extended without notice thereof and waive all exemptions that may be allowed by law.

(S'g'd) BEN C. HEYL.
(S'g'd) MAGDALENA C. HEYL.

And the said Mortgagors agree and do hereby covenant to keep the building thereon insured, in favor of the Mortgagee, in a good company to be selected by the Mortgagee in a sum not less than Three thousand dollars during the life of this Mortgage, and in case said Mortgagors fails to secure said insurance the Mortgagee is hereby authorized to procure the same. In case of loss by fire or otherwise of the buildings covered by this insurance the Mortgagee shall retain all amounts due on insurance as part payment of this mortgage.

And this instrument shall be void if said Promissory Note, principal and interest, be well and truly paid when due, according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said Promissory Note, or the principal thereon, shall not be punctually paid when the same shall become due, as in said Promissory Note mentioned, then and in such case, the principal sum of said Note, and the interest thereon, shall be deemed and taken to be wholly due at the option of the holder and payable, and proceedings may forthwith be had by the said Mortgagee John Stoffela, heirs, executors, administrators and assigns, for the recovery of the same, either by suit on said Note, or on this Mortgage and Note; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said Mortgagee his heirs, executors, administrators or assigns, to include in the judgment that may be recovered, attorneys' fees not exceeding Fifteen per cent. thereon upon the amount found due the plaintiff on said Note and this Mortgage, or in case of settlement after suit brought, but before judgment rendered, then Ten per cent. on amount found due at the time of settlement, as well as all payments that the said Mortgagee his heirs executors, administrators or assigns may be obliged to make for his security, or on account of any taxes, insurances, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

Witness our hands this Ninth day of January A. D. 1905.

BEN C. HEYL.
MAGDALENA C. HEYL.

Signed, sealed and delivered in the presence of—

—— ——.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona on this day personally appeared Ben C. Heyl known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that — executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 9″ day of Jan'y, A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10″, 1907.)

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma Territory of Arizona on this day personally appeared Magdalena C. Heyl wife of said Ben C. Heyl known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 9″ day of
32 January A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10″, 1907.)

(Endorsed:) Realty Mortgage from Ben C. Heyl and Magdalena C. Heyl, his wife, to John Stoffela. Dated Jan. 9, 1905. Filed and Recorded at request of John Stoffela, Jan. 9, A. D. 1905, at 11:10 A. M. Book —. Pages —. J. M. Polhamus, County Recorder. # 891. District Court, Yuma County. M. J. Nugent, Plaintiff, vs. John Stoffela, Defendant. Amended Complaint. Filed this 7th day of February, A. D. 1905, at 35 minutes after 9 o'clock A. M. Thos. D. Molloy, Clerk.

33 In the District Court of the First Judicial District, Territory of Arizona, in and for Yuma County.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Action brought in the District Court of the First Judicial District of the Territory of Arizona, in and for Yuma County, and the Complaint Filed in said Yuma County, in the Office of the Clerk of said District Court.

In the name of the Territory of Arizona, to John Stoffela, defendant, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Yuma, and answer the complaint therein filed with the Clerk of this said Court, at Yuma, in said County, within twenty days after the service upon you of this Summons, if served in this said County, or if served by publication within sixty days after the first publication thereof, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the District Court of the First Judicial District of the Territory of Arizona, in and for Yuma County, this 9th day of January, A. D. 1905.

[SEAL.] THOS. D. MOLLOY,
Clerk of said District Court.

34 OFFICE OF THE SHERIFF,
County of Yuma, ss:

I hereby certify, that I received the within Summons on the 10″ day of January A. D. 1905, at the hour 5 P. M., and personally served the same on the 10″ day of Jan. A. D. 1905, on John Stoffela, he being the defendant named in said Summons, by delivering to him the said John Stoffela personally, at Yuma, County of Yuma, Arizona, a copy of said Summons, to which was attached a true copy of the complaint mentioned in said Summons.

Dated this 10″ day of Jan. A. D. 1905.

Fees, Service	$1.50
Copies	$
Travel, 1 miles.....	$ .30
Publication	$
Total	$1.80

GUS LIVINGSTON, *Sheriff.*

(Endorsed:) No. 891. District Court, First Judicial District, County of Yuma, Territory of Arizona. M. J. Nugent, Plaintiff, vs. John Stoffela, Defendant. Summons. Filed Jan. 10th, 1905. Thos. D. Molloy, Clerk.

35 In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Yuma.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Now comes the above named Defendant, and demurs to the Plaintiff's complaint herein on the ground that same does not state facts sufficient to constitute a good cause of action.

Wherefore the Defendant prays that this Demurrer be sustained, that said Complaint be dismissed, and that he recover his costs of suit herein incurred.

CHARLES BLENMAN,
Attorney for Defendant.

And further answering Plaintiff's complaint herein, the Defendant alleges as follows:

I.

He admits that on January 4th, 1905, and for a long time prior thereto, one Magdalena C. Heyl was the owner, and in possession, of the following described real property, as her separate and individual estate, to-wit:

Lot one (1) in block twenty-one (21) and lot four (4) in block fifteen (15), all in the town of Yuma, County of Yuma, Territory of Arizona, according to White's official survey of said town
36 of Yuma.

II.

Defendant denies that on said 4th day of January, 1905, the said Magdalena C. Heyl, for a valuable consideration, to her in hand paid by the Plaintiff herein, sold and conveyed to the said Plaintiff by a good and sufficient deed in writing, all of the aforesaid real property, and Defendant also denies that ever since said last mentioned date, or at any time, or at all, Plaintiff has been the owner, and entitled to the possession, of all of said real property.

III.

Defendant admits that the deed marked Exhibit A and made a part of said complaint, was executed by the said Magdalena C. Heyl but alleges that the same was without any consideration whatever, and that the consideration therein named, to-wit, the sum of Fifteen thousand dollars ($15,000.) was and is false and fraudulent, and that such consideration was not paid by the said Plaintiff to the said Magdalena C. Heyl, nor was any consideration at all paid by him to her.

IV.

Defendant denies that, on the 9th day of January, 1905, he, well knowing that the said Plaintiff had purchased all of said real property, and was the owner and entitled to the possession thereof, made a pretended purchase of a part of said property, to-wit: said lot four (4) in block 15, from the said Magdalena C. Heyl and Ben
37 C. Heyl, her husband, and induced them to make and deliver to him, their deed in writing therefor, a copy of which deed is attached to said complaint, and marked Exhibit B. and made a part thereof. But Defendant alleges, that on said 9th day of January, 1905, knowing and believing that the said Magdalena C. Heyl, was the owner in fee simple, in her own separate right, subject to two duly acknowledged and recorded mortgages thereof from her and her said husband to Defendant, under which said mortgages there was then due by them to Defendant, a sum of about Fifteen thousand seven hundred ($15,700.) dollars, of all of said real property hereinbefore described, and that she the said Magdalena C. Heyl, was then in the actual possession thereof, entered into the agreement hereinafter mentioned.

That Defendant knew and believed the said Magdalena C. Heyl to be the owner of all of said real property, and on said last mentioned date, in the town of Yuma, agreed with her for the purchase of said lot four (4) block 15 of the town of Yuma for the price of Ten thousand dollars ($10,000.), and also agreed with her that the amount of said purchase price should be credited to her against the said amount then due on said mortgage, and that the balance due on said mortgage, which was then settled between her and the Defendant at the sum of Five thousand seven hundred ($5,700.) dollars, should be secured to be paid by a mortgage from her to the Defendant over lot one (1) in block twenty-one (21) of the
38 said town of Yuma, and it was also then and there agreed between the Defendant and the said Magdalena C. Heyl that, immediately on the said deed to him for said lot four (4) of said block 15 being executed by her and her said husband, and delivered, and the said mortgage over said lot one (1) of said block 21, to secure the sum of $5,700. being executed by her and her said husband, and delivered, he would discharge and satisfy said recorded mortgages securing the said sum of $15,700.00.

V.

That in pursuance of said agreement, the said Magdalena C. Heyl and her said husband, executed, acknowledged and delivered to the Defendant, on the said 9th day of January, 1905, an absolute bargain and sale deed of said lot 4, block 15, of the town of Yuma, which deed contained the implied covenants that, previous to the time of the execution thereof, the said Magdalena C. Heyl and her said husband had not conveyed the property comprised and described therein, or any right, title and interest therein, to any person other than the defendant, and also that such property was, at the time of the execution of such deed, free from incumbrances, a true copy of

which deed is attached to said complaint, marked Exhibit B. and made a part thereof, and also in pursuance of said agreement, the said Magdalena C. Heyl and her husband, executed, acknowledged and delivered to the Defendant, on said last mentioned date, a
39 mortgage, to secure the said sum of $5,700. over said lot 1, block 21, of the town of Yuma, a true copy of which mortgage is attached to said complaint, marked Exhibit C. and made a part thereof. Whereupon, and also in pursuance of said agreement, and immediately upon such last mentioned deed and mortgage being executed and delivered, the Defendant discharged and satisfied his said recorded mortgages under which there was then due, the said sum of $15,700. as aforesaid.

VI.

That on the said 9th day of January, 1905, at 11 o'clock in the forenoon of such day, the Defendant caused to be recorded in the office of the County Recorder of Yuma County, in the said town of Yuma, the said deed marked Exhibit B. and the said mortgage marked Exhibit C. respectively.

VII.

That said sum of Ten thousand ($10,000.) dollars, being the consideration mentioned in said deed marked Exhibit B. was actually paid under the circumstances hereinbefore set forth by the Defendant to the said Magdalena C. Heyl, at the time of the date of said deed.

VIII.

That this Defendant had not, at or before the time of the said deed marked Exhibit B. any notice whatsoever, either express or implied, of the said deed, marked Exhibit A. claimed by the Plaintiff, nor was the same then recorded.

40 IX.

Defendant denies that the said deed marked Exhibit B. and the said mortgage marked Exhibit C. are a cloud upon the title of Plaintiff's property, and Defendant denies that Plaintiff has any title to the said real property hereinbefore described, or any part thereof, and also denies that said property, or any part thereof, at any time, belonged to Plaintiff, and Defendant also denies that said last mentioned deed and mortgage, or either of them, were made by said Magdalena C. Heyl and her husband without right or shadow of right and also denies that they had no title or color of title to said property comprised and described therein when they executed and delivered the same. And Defendant also denies that any money or valuable thing that he may have paid to them, or either of them, for said last mentioned deed and mortgage, was paid with the foll knowledge that they or either of them had no right to receive said money or valuable thing from the Defendant therefor, and further denies that they had no right to make said last mentioned deed or mortgage.

Wherefore the Defendant prays that he may be hence dismissed with his costs of suit, and that the Plaintiff take nothing by his said complaint.

CHARLES BLENMAN,
Attorney for Defendant.

41 And for cross complaint against the Plaintiff herein, the Defendant alleges:

I.

That the said deed marked Exhibit A. was made without any consideration and is therefore void. That the said deed was not recorded in the office of the County Recorder of Yuma County until after the said deed and mortgage marked respectively Exhibit B and Exhibit C were respectively recorded in such office. That said deed marked Exhibit A is a cloud upon Plaintiff's title to his said property known as said lot four (4) of said block 15, of the town of Yuma, which he owns in fee simple, and is also a cloud on his title as mortgagee thereof, to said lot one (1) of said block twenty-one (21) of the said town of Yuma.

Wherefore Defendant demands judgment against the Plaintiff as follows:

1. That said deed marked Exhibit A be cancelled.
2. That said plaintiff, or any one claiming under him, has no right, title, claim, interest or demand to or upon the whole of said real property, or any part thereof.
3. For such other and further relief as may be just and equitable, and for all proper orders.
4. And for costs of suit herein incurred.

CHARLES BLENMAN,
Attorney for Defendant.

42 TERRITORY OF ARIZONA,
County of Yuma, ss:

John Stoffela, being by me first duly sworn, deposes and says: That he is the defendant named in the above entitled cause, that he has read the foregoing demurrer, answer and cross-complaint and knows the contents of the same respectively. That the same respectively are true, except as to matters therein stated on information and belief, and as to those matters he believes them respectively to be true.

JOHN STOFFELA.

Subscribed and sworn to before me this 21 day of Jan. 1905.
[SEAL.]
H. WUPPERMAN,
Notary Public, Yuma Co., Ariz.

My commission expires Jan. 7, 1909.

(Endorsed:) No. 891. In the District Court of the First Judicial District of the Territory of Arizona, in and for Yuma County. M. J. Nugent, Plaintiff vs. John Stoffela, Defendant. Demurrer and Answer. Filed Jan. 24th, 1905, at 1:00 P. M. Thos. D. Molloy, Clerk.

43 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Yuma.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Now comes the plaintiff and demurs to the cross complaint of the defendant on the ground that the same does not state facts sufficient to constitute a cause of action.

C. L. BROWN,
EUGENE S. IVES,
Attorneys for Plaintiff.

If said demurrer should be overruled plaintiff denies that the deed referred to in said cross complaint and marked "Exhibit A" is a cloud upon the title of the cross complainant to any property of the said cross complainant, or to lot 4 of Block 15 of the town of Yuma, and denies that the said cross complainant owns the lot in fee simple or has any interest whatever therein; and denies that the said deed is a cloud on the title of the complainant as mortgagee of Lot No. 1 of Block 21 of the town of Yuma, and denies that the cross complainant has any interest in said last described premises as mortgagee or otherwise.

44 Wherefore the plaintiff demands judgment that the said cross complaint be dismissed, together with his costs.

C. L. BROWN,
EUGENE S. IVES,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA,
County of ——, ss:

C. L. Brown being first duly sworn, on his oath, says: that he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing demurrer and answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that plaintiff is now absent from Yuma County and affiant knows the facts in regard to said action as well as the plaintiff.

C. L. BROWN.

Subscribed and sworn to before me this 7th day of February, 1905. My commission expires June 17, 1907.

[SEAL.] THOS. D. MOLLOY,
Notary Public.

(Endorsed:) #891. District Court, Yuma County. M. J. Nugent, Plaintiff, vs. John Stoffela, Defendant. Demurrer and Answer. Filed this 7th day of February A. D. 1905, at 30 minutes after 9 o'clock A. M. Thos. D. Molloy, Clerk.

45 In the District Court of the First Judicial District of the Territory of Arizona in and for Yuma County.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Findings.

The issues herein having come on for trial at the regular term in and for the County of Yuma, before the Honorable John H. Campbell, Judge, sitting without a jury, and the plaintiff having offered evidence in support of his complaint, and the defendant having offered evidence in support of his answer and cross-complaint and the defendant having offered evidence in rebuttal and reply thereto, and due deliberation having been had, the Court now makes its decision and finds the following facts and conclusions of law:

Facts.

I.

On the 4th day of January, 1905, and for a long time prior thereto, Magdalena C. Heyl, was the owner of, and in the possession of the following described real property as her separate and individual estate, to-wit:

Lot 1, in Block 21, and lot 4 in Block 15, all in the
46 town of Yuma, County of Yuma, Territory of Arizona, according to White's official survey of said town of Yuma, subject to judgment liens thereon in favor of the Defendant, John Stoffela, on which there was due to him on the said 4th day of January, 1905, the sum of $15,700 and interest at the rate of one and one-half per cent per month.

II.

That on the said 4th day of January, 1905, the said Magdalena C. Heyl, for a valuable consideration, executed and delivered to M. J. Nugent, the plaintiff, by good and sufficient deed, in writing, all of the aforesaid real property.

III.

That prior to the execution of the said deed to the said Nugent, the said Magdalena C. Heyl, was indebted to the defendant, and had executed and delivered to the defendant two mortgages upon the said property. That prior to the said 4th day of Jan. 1905, the defendant had instituted a suit of foreclosure against the said Magdalena C. Heyl, and judgment had been entered therein in favor of the defendant, Stoffela, and against the said Magdalena C. Heyl, and decreeing that said premises be sold at public auction, and the proceeds applied to the satisfaction of the said judgment, and that there was due to the Defendant as aforesaid the said sum of $15,700 and interest.

IV.

That the said premises in pursuance of said judgment were
47 duly advertised for sale by the sheriff of the County of Yuma, said sale to take place in the town of Yuma on the 10th day of January, 1905.

V.

That on the 9th day of January, 1905, the said Magdalena C. Heyl, executed and delivered to the said defendant, for and in consideration of the sum of $10,000 a certain deed in writing, purporting to convey to the said defendant the said lot 4, block 15, and on the same date the said Magdalena C. Heyl executed and delivered to the said defendant, a mortgage upon the said lot 1, block 21, to secure the sum of $5,700.

VI.

That the said deed and mortgage executed by the said Heyl to the said Stoffela were recorded in the office of the Recorder of the county of Yuma on the 9th day of January, 1905; that the said deed from the said Heyl to the said Nugent was recorded in the office of the Recorder of the county of Yuma subsequent to the recording of the said deed and mortgage from the said Heyl to the defendant.

VII.

That the said plaintiff in consideration of the said deed executed and delivered to him by the said Magdalena Heyl agreed with the said Magdalena C. Heyl that he would procure the said mortgages and judgment liens in favor of the said defendant and against the said Magdalena C. Heyl to be paid and satisfied, and that the
48 said plaintiff, in compliance with the said agreement with the said Magdalena C. Heyl, in good faith, made effort to pay the amount due upon the said mortgage and judgment to the said Stoffela with interest and offered to pay the same with interest; and that the said Stoffela acting in bad faith with intent to prevent the acquisition by the said Nugent of title to the said property, evaded the payment to him by the said Nugent of the amount of the said judgment liens and procured the aforesaid deed and mortgage to be executed by the said Heyl to himself.

VIII.

That on or about the 5th day of January, 1905, the said defendant had full, complete and adequate notice of the execution and delivery of the said deed from Heyl to the plaintiff.

IX.

That on the 9th day of January, 1905, the defendant voluntarily and of his own notion, and not at the instance of the plaintiff or of anyone acting in his behalf, and not by mistake or inadventence, but deliberately and in bad faith with intent fraudulently to defeat

the title of the said Nugent in and to the said property under the said deed from the said Heyl, and to procure and effectuate in himself, title to the said property, did satisfy of record the said mortgage and the said judgment liens, and the sole and only consideration made or paid to him therefor was said deeds and mortgages executed to him by said Heyl.

49 *Conclusions of Law.*

I.

The deed executed on the 4th day of January, 1905, by the said Magdalena C. Heyl to the plaintiff, conveyed a good and sufficient title in fee simple to the premises, to-wit:

Lot 1, Block 21, and lot 4 in block 15, all in the town of Yuma, county of Yuma, territory of Arizona, according to White's official survey of said town of Yuma.

II.

The deed executed by the said Heyl to the defendant on the 9th day of January, 1905, purporting to convey lot 4, in block 15, to said defendant conveyed no title whatever, and is null, void and of no effect.

III.

That the mortgage executed by the said Heyl to the defendant purporting to convey the said lot 1 in block 21 as security for the sum of $5700 did not convey any title whatever, or create any lien or encumbrance whatever upon the said lot 1 in block 21, and the said mortgage is void and of no effect and force whatever.

IV.

That upon compliance with the conditions hereinafter imposed the plaintiff is entitled to judgment against the defendant establishing the title of the plaintiff in fee simple and the right of the
50 plaintiff to the possession of said lots 5 in block 15 and 1 in said Block 21, and barring and forever estopping the defendant from having or claiming any right or title to the said lots adverse to the plaintiff.

V.

That the said deed and mortgage executed by the said Heyl and delivered to the defendant and recorded in the office of the Rcorder of the county of Yuma are a cloud upon the title of plaintiff to the two lots in question.

VI.

That upon compliance with said conditions the plaintiff is entitled to judgment against the defendant that the said deed and mortgage executed by the said Heyl to the defendant, and recorded in the office of the Recorder of the county of Yuma, be cancelled and declared to be of no effect whatever.

VII.

That it would be unconscionable and inequitable that the plaintiff should have judgment establishing his title and right to the possession of the said premises and cancelling the said deed and mortgage without paying to the defendant the amount of the said judgment liens without interest, to-wit, the sum of $15,700, and that as a condition precedent to the enjoyment of the fruits of the said judgment the plaintiff should pay within fifty days from the date hereof, the said sum of $15,700 to the defendant, less the proper counsel fee of the plaintiff hereby fixed at the sum of $600 and the costs of this action.

51 Let judgment be entered accordingly.
Dated this 15th day of May, 1905.
JOHN H. CAMPBELL, *Judge.*

(Endorsed:) In the District Court Yuma County. M. J. Nugent, Plaintiff, vs. John Stoffela, Defendant. Findings of Fact and Conclusions of Law.

52 In the District Court of the First Judicial District of the Territory of Arizona in and for Yuma County.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Judgment.

The issues herein having come on for trial at the regular term of the District Court of the First Judicial District in and for the county of Yuma, before the Honorable John H. Campbell, Judge, sitting without a jury, and the plaintiff having offered evidence in support of his compliant, and the defendant having offered evidence in support of his answer and cross-complaint, and the defendant having offered evidence in rebuttal and reply thereto, and due deliberation having been had, and the court having made and filed its decision containing the findings of fact and conclusions of law, now, on motion of the attorneys for the plaintiff, it is

Ordered, Adjudged and Decreed:

1. That the title of the plaintiff in fee simple and the right of the plaintiff to the possession of lots 4 in block 15 and 1 in block 21, in the town of Yuma, be, and the same hereby is established.

53 2. That the defendant and all persons claiming under him be, and they hereby are, barred and forever estopped from having or claiming any right, or title to said lot 4 in block 15, and the said lot 1, in block 21, adverse to the plaintiff.

3. That a certain deed executed by Magdalena C. Heyl and Ben Heyl, her husband, to the defendant, John Stoffela, which said deed bear date the 9th day of January, 1905, and is recorded in the office of the Recorder of the County of Yuma on the 9th day of

January, 1905, in Book 21 of Deeds at page 76; and a certain mortgage executed by the said Magdalena C. Heyl and Ben Heyl, her husband, to the said John Stoffela, to secure the sum of $5,700, which said mortgage bears date the 9th day of January, 1905, and was recorded in the office of the Recorder of the County of Yuma on the 9th day of January, 1905, in Book 6 of Mortgages at page 157 be, and the same hereby are, cancelled and declared to be of no effect whatever.

4. That the foregoing decrees are upon the express condition that on or before the 4th day of July, 1905, the plaintiff pay or cause to be paid to the defendant the sum of $15,700 less the sum of $600, together with $2.85 his costs in this action; and in case the plaintiff should fail to pay to defendant said sum less the sum of $600, and his costs as aforesaid, on or before the said date, then this judgment shall be void and of no force and effect whatever.

Done in open court this 15th day of May, 1905.

JOHN H. CAMPBELL, *Judge.*

54 (Endorsed:) District Ct., Yuma Co. M. J. Nugent, Plaintiff, vs. John Stoffela, Defendant. Judgment. Filed this 15th day of April A. D. 1905, at 30 minutes after 4 o'clock P. M. Thos. D. Molloy, Clerk.

(Endorsed:) No. 891. In the District Court of the First Judicoal District of the Territory of Arizona, in and for the County of Yuma. M. J. Nugent, Plaintiff vs. John Stoffela, Defendant. Judgment Roll. Filed this 15" day of April A. D. 1905, at 0 minutes after 4 o'clock P. M. Thos. D. Molloy, Clerk. No. 917. In the Supreme Court, of the Territory of Arizona. M. J. Nugent, vs. John Stoffela. Judgment Roll. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

55 *Quit-claim Deed.*

This Indenture, Made the Fourth day of January in the year of our Lord One Thousand Nine Hundred and five between Magdalena C. Heyl, formerly Magdalena C. Levy, and Ben C. Heyl, her husband, the parties of the first part, and M. J. Nugent, the party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of Fifteen thousand four hundred dollars, lawful money of the United States of America, to — in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, *has* remised, released and quit-claimed, and by these presents do convey, remise, release and quit-claim unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest, claim and demand which the said part- of the first part *has* in and to the following described real estate and property situated in the County of Yuma, and Territory of Arizona, to-wit:

Lot one (1) in Block Twenty-one (21), and lot four (4) in Block Fifteen (15) all in the Town of Yuma according to White's official survey of said Town of Yuma.

To have and to hold the same, together with all and singular, the appurtenances and privileges thereunto belonging, or in anywise appertaining, and all the estate, right, title, interest and claim
56 whatsoever, of the said parties of the first part, either in law or equity, in possession or expectancy, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

MAGDALENA C. HEYL. [SEAL.]

Signed and delivered in the presence of

—— ——.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me J. L. Redondo, a Notary Public in and for the County of Yuma Territory of Arizona, on this day personally appeared Magdalena C. Heyl, wife of said Ben C. Heyl known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 4th day of January A. D., 1905.

[SEAL.] J. L. REDONDO,
Notary Public.

(My Commission expires Jan. 5", 1905.)

TERRITORY OF ARIZONA,
County of Yuma, ss:

I, J. M. Polhamus, County Recorder in and for the County
57 and Territory aforesaid, do hereby certify that the within instrument was filed for record at 2:30 o'clock P. M. on this 9 day of January 1905, and duly recorded in Book No. 19 of Quit-Claim Deeds Records of Yuma County, Arizona, at pages 50.

Witness my hand and official seal the day and year first above written.

J. M. POLHAMUS,
County Recorder.

(Endorsed:) #136. Compared. Quit-Claim Deed. Short Form. From Magdalena C. Heyl and husband to M. J. Nugent. Dated Jan. 4, 1905. Filed and recorded at request of M. J. Nugent Jan. 9, A. D. 1905. at 2:30 P M., Book 19 Q. C. Deeds, Pages 5 J. M. Polhamus, County Recorder. No. 891. In the District Court of the 1st Judicial District of the Territory of Arizona in and for the County of Yuma. M. J. Nugent vs. John Stoffela. Pl't'ff's Ex. A. Filed at 9:45 o'clock A. M. Apr. 15, 1905. Thos. D. Molloy, Clerk.

TERRITORY OF ARIZONA,
County of Yuma, ss:

I, Thomas D. Molloy, Clerk of the District Court, First Judicial District, County of Yuma, Territory of Arizona, do hereby certify that the foregoing is a true, full and correct copy of plaintiff's exhibit "A" in cause No. 891, M. J. Nugent Plaintiff, vs. John Stoffela, Defendant, and offered and admitted in evidence in said
58 cause, and withdrawn from the files, upon order of the Court, and the filing of the above copy.

In witness whereof, I have hereunto set my hand and seal of said Court, this 18th day of May, A. D. 1905.

[SEAL.] THOS. D. MOLLOY,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

(Endorsed:) 891. Nugent vs. Stoffela. P't'ff's Ex. A. Filed Apr. 15", 1905. Thos. D. Molloy, Clerk. No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent vs. John Stoffela. Pl't'ff's Ex. A. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

59 This Memorandum of Agreement made on this Fourth day of January, A. D., 1905, between M. J. Nugent, an unmarried man, of Yuma, Arizona, the party of the first part, and Louis Levy and all the other children of Isaac Levy, deceased, of Yuma, Arizona, the party of the second part, witnesseth:

That for and in consideration of the sum of One Dollar, lawful money in the United States in hand paid to the said first party by the said second parties, the receipt whereof is hereby confessed, the said first party hereby grants and gives to the said second parties the right and option to buy the following described property, to-wit:

Lot One (1) in Block Twenty-one and lot Four (4) in Block Fifteen, all in the town of Yuma, Yuma County, Arizona Territory, according to White's official survey of said town of Yuma. This right and option shall run for the period of two years and the consideration to be paid for said property is the sum of Fifteen Thousand Four Hundred Dollars, lawful money of the United States of America.

In witness whereof, the said party has hereunto set his hand on the day and date first above written.

M. J. NUGENT.

TERRITORY OF ARIZONA,
County of Yuma, ss:

On this 4th day of January, A. D., 1905, before me, J. L. Redondo, a notary public in and for Yuma County, Arizona Territory,
60 personally appeared M. J. Nugent, personally known to me to be the person whose name is subscribed to the above writing as the first party thereto, and he duly acknowledged to me that he signed said instrument of writing freely and voluntarily and for the consideration and uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, the day and date in this certificate first above written.

[SEAL.] J. L. REDONDO,
Notary Public in and for Yuma County, Arizona.

My Notarial Commission will expire Jan. 5th, 1905.

TERRITORY OF ARIZONA,
County of Yuma, ss:

I, Thomas D. Molloy, Clerk of the District Court, First Judicial District, County of Yuma, Territory of Arizona, do hereby certify that the foregoing is a true, full and correct copy of plaintiff's exhibit "B" in cause No. 891, M. J. Nugent, Plaintiff, vs. John Stoffela, Defendant, and offered and admitted in evidence in said cause, and withdrawn from the files, upon order of the Court, and the filing of the above copy.

In witness whereof, I have hereunto set my hand and seal of said Court, this 18th day of May, A. D., 1905.

[SEAL.] THOS. D. MOLLOY,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

61 (Endorsed:) No. 891. In the District Court of the 1st Judicial District of the Territory of Arizona in and for the County of Yuma. M. J. Nugent vs. John Stoffela. Pl't'ff's Exh. B. Filed this 15" day of April A. D., 1905, at 30 minutes after 1 o'clock P. M. Thos. D. Molloy, Clerk. No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent vs. John Stoffela. Pl't'ff's Ex. B. Filed July 28, 1905, S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

62 (*Local Item Published in "The Yuma Sun," a Newspaper Published at Yuma, Yuma County, Arizona, of Date January 6. 1905.*)

M. J. Nugent has bought the Levy property on the east side of Main street, between Second and Third Streets, and on the corner of Third street and Madison avenue. The heirs have the right to buy it back at the same price within a stipulated time.

(Newspaper Endorsed:) #891. Pl't'ff's Exhibit "C"; Filed Apr. 15/'05. Thos. D. Molloy, Clerk. No. 917. Supreme Court, Territory of Arizona. Pl't'ff's Ex. C. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

63 *Bargain and Sale Deed.*

This indenture, Made the ninth day of January in the year of our Lord, One Thousand Nine Hundred and five, between Ben C. Heyl and Magdalena C. Heyl, his wife, parties of the first part, and John Stoffela the party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of Ten Thousand ($10,000.00) no/100 Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land, situate, lying and being in the County of Yuma, Territory of Arizona, and bounded and described as follows, to-wit:

Being all of Lot Number Four (4) in Block Number Fifteen (15) of the village of Yuma, County of Yuma, Territory of Arizona, as per White's official survey of said village. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof, and, also, all the estate, right, title, interest, claim of homestead, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

64 To have and to hold, all and singular, the above described premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said part- of the first part ha- hereunto set — hand and seal the day and year first above written.

BEN C. HEYL. [SEAL.]
MAGDALENA C. HEYL. [SEAL.]

Signed, Sealed and Delivered in the presence of
—— ——.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Ben. C. Heyl known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 9" day of January, A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10", 1907.)

TERRITORY OF ARIZONA,
County of Yuma, ss:

65 Before me Frank Baxter a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Magdalena C. Heyl, wife of said Ben C

Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 9" day of January, A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10", 1907.)

TERRITORY OF ARIZONA,
County of Yuma, ss:

I, J. M. Polhamus, County Recorder in and for the County and Territory aforesaid, do hereby certify that the within instrument was filed for record at 11:00 o'clock A. M., on this 9th day of January, 1905, and duly recorded in Book No. 21 of B. & S. Deeds Records of Yuma County, Arizona, at pages 76.

Witness my hand and official seal the day and year first above written.

[SEAL.] J. M. POLHAMUS,
County Recorder.

(Endorsed:) 129. Compared. Bargain and Sale Deed. Long Form. From Ben C. Heyl & Wife to John Stoffela. Dated Jan. 9, 1905. Filed and recorded at request of John Stoffela Jan. 9, A. D. 1905, at 11 A. M. Book 21 B. & S. Deeds. Pages 76. J. M. Polhamus, County Recorder. No. 891. In the District Court of the 1st Judicial District of The Territory of Arizona in and for the
66 County of Yuma. M. J. Nugent vs. John Stoffela. Def't's Exhibit 1. Filed at 10:15 o'clock A. M. Apr. 15, 1905. Thos. D. Molloy, Clerk. No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent vs. John Stoffela. Def't's Ex. 1. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

67 *Realty Mortgage.*

Know all men by these presents: That Ben C. Heyl and Magdalena C. Heyl, his wife, Mortgagor- of Yuma, County of Yuma, Territory of Arizona, for and in consideration of Five Thousand seven hundred dollars ($5700.00) *Dollars,* to us in hand paid by John Stoffela, same plac- Mortgagee, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said John Stoffela all that certain premises described as follows, to-wit:

All of Lot one (1) Block twenty-one (21) of the village of Yuma, County of Yuma, Territory — Arizona, as per White's official survey of said village, except that part decreed Eulalia Caseras for the term of her natural life, the same being a part of the records of the Probate Court, Yuma County, in the matter of the will of Isaac Levy, deceased.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise

belonging, unto the said John Stoffela, Mortgagee, his heirs and assigns forever.

This conveyance is intended as a Mortgage to secure the payment of a certain Promissory Note, given by Ben C. Heyl and Magdalena C. Heyl to John Stoffela, of date January 9th, 1905, which said note is in words and figures following, to-wit:

68 YUMA, A. T., *Jan'y* 9, 1905.

Three years after date or before for value received we promise to pay to order of John Stoffela Five thousand seven hundred dollars ($5700.00) U. S. Gold Coin at his place of business in the village of Yuma, Yuma Co., A. T., with interest of one per cent (1%) per month in like coin from date until paid. Interest to be paid monthly and if not paid when due to become as principal and bear the same rate of interest. The makers of this note waive presentment for payment, notice of non payment, protest & notice of protest and consent that time of payment may be extended without notice thereof and waive all exemptions that may be allowed by law.

(S'g'd) BEN C. HEYL.
(S'g'd) MAGDALENA C. HEYL.

And the said mortgagors agree & do hereby covenant to keep the building thereon insured in favor of the Mortgagee in a good company to be selected by the Mortgagee in a sum not less than Three thousand dollars during the life of this mortgage and in case said Mortgagors fail to secure said insurance, the Mortgagee is hereby authorized to procure the same. In case of loss by fire or otherwise of the buildings covered by this insurance, the Mortgagee shall retain all amounts due on insurance as part payment of this mortgage.

And this instrument shall be void if said Promissory Note, principal and interest, be well and truly paid when due, according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said Promissory Note, or the principal thereon, shall not be punctually paid when the same shall become due, as in said Promissory Note mentioned, then, and in such case, the principal sum of said Note, and the interest thereon, shall be deemed and taken to be wholly due, at the option of the holder, and payable, and proceedings may forthwith be had by the said Mortgagee John Stoffela, heirs, executors, administrators and assigns, for the recovery of the same, either by suit on said Note or on this Mortgage and Note; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said Mortgagee his heirs, executors, administrators or assigns, to include in the judgment that may be recovered attorney's fees not exceeding fifteen per cent thereon upon the amount found due the plaintiff on said Note and this Mortgage, or in case of settlement after suit brought, but before judgment rendered, then ten per cent on amount found due at the time of settlement, as well as all pay-

69

ments that the said Mortgagee his heirs, executors, administrators or assigns may be obliged to make for his security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

Witness our hands this ninth day of January, A. D. 1905.

70 BEN C. HEYL. [SEAL.]
MAGDALENA C. HEYL. [SEAL.]

Signed, Sealed and Delivered in the presence of
—— ——.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Ben C. Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that — executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 9" day of Jan. A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10", 1907.)

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me Frank Baxter, a Notary Public in and for the County of Yuma, Territory of Arizona, on this day personally appeared Magdalena C. Heyl, wife of said Ben C. Heyl, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 9" day of January, A. D. 1905.

[SEAL.] FRANK BAXTER,
Notary Public.

(My Commission expires July 10", 1907.)

71 TERRITORY OF ARIZONA,
County of Yuma, ss:

I, J. M. Polhamus, County Recorder in and for the County and Territory aforesaid, do hereby certify that the within instrument was filed for record at 11:10 o'clock A. M., on this 9th day of January, 1905, and duly recorded in Book No. 6 of R. of M. Records of Yuma County, Arizona, at pages 157.

Witness my hand and official seal the day and year first above written.

[SEAL.] J. M. POLHAMUS,
County Recorder.

(Endorsed:) 132. Compared. Realty Mortgage from Ben C. Heyl & wife to John Stoffela. Dated Jan. 9", 1905. Filed and recorded at request of John Stoffela, Jan. 9th, 1905, at 11:10 A. M. Book No. 6. Mort., pages 157. J. M. Polhamus, County Recorder. No. 891. In the District Court of the 1st Judicial District of the Territory of Arizona in and for the County of Yuma. M. J. Nugent vs. John Stoffela. Def't- Exhibit 2. Filed at 10:15 o'clock A. M. Apr. 15, 1905. Thos. D. Molloy, Clerk. No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent vs. John Stoffela. Def't's Ex. 2. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

72 YUMA, A. T., *January 9th,* 1905.

To the Treasurer of Yuma Co., A. T., Yuma, A. T.

SIR: I hereby offer you payment of County & Territorial taxes due to date against Lot four, Block fifteen, as bought by me from Ben C. Heyl and wife under date January 9th, 1905, and against Lot one Block twenty-one, on which premises I hold mortgage under date January 9th, 1905, all situate in village of Yuma, County of Yuma, A. T. The total amount being $598.25. If payment has been made by other parties, not authorized to do so, I request you to return money to them.

Respectfully, JOHN STOFFELA.

Acknowledge receipt of communication within. Taxes having been paid previous to letter of January 9th, I can not accept second payment, there being no legal claim against the property mentioned.

P. B. HODGES,
Treasurer Yuma County.

Yuma, A. T., January 9th, 1905.

(Endorsed:) No. 891. In the District Court of the 1st Judicial District of the Territory of Arizona in and for the County of Yuma. M. J. Nugent vs. John Stoffela. Def't's Exhibit 3. Filed at — o'clock — M. Apr. 15, 1905. Thos. D. Molloy, Clerk. No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent vs. John Stoffela. Def't's Ex. 3. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

73 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Yuma.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Notice of Appeal.

To John Stoffela, the above named defendant, and Charles Blenman and Thomas Armstrong, Jr., attorneys for said defendant:

You and each of you are hereby notified that the plaintiff, M. J. Nugent, in the above entitled action, hereby appeals to the Supreme

Court of the Territory of Arizona from that portion of the judgment and decree therein entered in the above entitled court, on the fifteenth day of May A. D., 1905, which requires that said plaintiff shall pay to said defendant, on or before July 4th, A. D., 1905, the sum of fifteen thousand and seven hundred dollars less six hundred dollars, and costs, and in the event of said plaintiff's failure or refusal to so pay said sum of money that said judgment and decree shall be null and void. Plaintiff also appeals from the order denying plaintiff's motion for new trial in said action.

Dated this 3rd day of July, A. D., 1905.

EUGENE S. IVES AND
C. L. BROWN,
Attorneys for Plaintiff.

74 (Endorsed:) No. 891. In the District Court of the 1st Judicial District of the Territory of Arizona in and for the County of Yuma. M. J. Nugent Pl'tiff vs. John Stoffela, Def. Notice of Appeal. Filed this 3rd day of July A. D., 1905, at 0 minutes after 1 o'clock P. M. Thos. D. Molloy, Clerk. No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent vs. John Stoffela. Notice of Appeal. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

75 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Yuma.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Know all men by these presents, that we, M. J. Nugent, as principal, and A. Modesti and L. W. Alexander, as sureties, are held and firmly bound unto the said John Stoffela in the sum of two hundred dollars, lawful money of the United States, to be paid to the said John Stoffela, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 3rd day of July, A. D., 1905.

Whereas on the 15" day of April, A. D., 1905, the said M. J. Nugent obtained a judgment and decree against the said John Stoffela, in the above entitled court and cause, declaring and decreeing null and void a certain deed executed in favor of the said John Stoffela by Magdalena C. Heyl and Ben C. Heyl for lot 4, in block 15, in the town of Yuma, Arizona Territory, and also declar-

76 ing and decreeing null and void a certain mortgage executed in favor of said John Stoffela by the said Magdalena C. Heyl and Ben C. Heyl upon lot 1, in block 21, in said town of Yuma, Arizona Territory;

And whereas said court did also in said judgment and decree establish and declare that said M. J. Nugent's deed to all of said

property, executed by said Magdalena C. Heyl, is valid and did quiet the title to all of said property in the said M. J. Nugent, but also declares and decrees that unless the said M. J. Nugent shall pay to the said John Stoffela on or before the 4th day of July, A. D., 1905, the sum of fifteen thousand and one hundred dollars and costs that said judgment and decree shall be null and void;

And whereas the said M. J. Nugent is dissatisfied with that part of said judgment and decree which requires him to pay to said John Stoffela said sum of money, or any sum of money whatever, in order that his said judgment and decree may remain in force and effect, and has appealed from such portion of said judgment and decree requiring the payment of said money to the Supreme Court of the Territory of Arizona,

Now, therefore, the condition of this obligation is such that if the above named M. J. Nugent shall prosecute his said appeal with effect and pay all costs that have accrued in the above entitled district court and also the costs which may accrue in said Supreme Court then this obligation shall be void; otherwise to remain in full force and virtue.

77

M. J. NUGENT.
A. MODESTI.
L. W. ALEXANDER.

TERRITORY OF ARIZONA,
County of Yuma, ss:

A. Modesti and L. W. Alexander the sureties on the foregoing undertaking, being first duly sworn, on his oath says, each for himself and not one for the other, that he is a house-holder and resident in Yuma County, Arizona Territory, and is worth the sum of two hundred dollars in unincumbered property situate in said Yuma County, Arizona Territory, over and above his debts and liabilities, exclusive of property exempt from execution and forced sale.

A. MODESTI.
L. W. ALEXANDER.

Subscribed and sworn to before me this 3rd day of July, 1905.

[SEAL.] THOS. D. MOLLOY,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

(Endorsed:) No. 891. In the District Court of the 1st Judicial District of the Territory of Arizona in and for the County of Yuma. M. J. Nugent, Pl't'ff vs. John Stoffela, Def't. Bond on Appeal. Filed this 3rd day of July A. D. 1905, at 0 minutes after 1 o'clock P. M. Thos. D. Molloy, Clerk. No. 917. Supreme Court, Territory of Arizona. M. J. Nugent vs. John Stoffela. Bond on Appeal. Filed July 28, 1905, S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

78 TERRITORY OF ARIZONA,
Yuma County, ss:

I, Thomas D. Molloy, Clerk of the District Court of the First Judicial District of the Territory of Arizona, in and for Yuma County, do hereby certify that the within and following is a correct transcript of all the proceedings in cause No. 891—M. J. Nugent, Plaintiff, vs. John Stoffela, Defendant,—in said Court; the same containing a copy of all the minutes entries, judgments and decrees of the Court in said cause.

In witness whereof, I have hereunto set my hand, and the seal of said Court, this 21st day of July, A. D. 1905.

[SEAL.] THOS. D. MOLLOY,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

The transcript in this cause was demanded by Eugene S. Ives on July 21st, A. D. 1905, and transmitted by express on the same day, to the Clerk of the Supreme Court.

THOS. D. MOLLOY,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

79 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Yuma, Regular April Term, A. D. 1905.

MONDAY, *April 3rd*, 1905.

Present: Hon. John H. Campbell, Presiding Judge.

No. 891.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Defendant's counsel not being present, it is ordered that this cause be passed till another day.

It is further ordered, plaintiff's attorneys assenting thereto, that defendant's demurrer to plaintiff's complaint, on file herein, be set for hearing on Tuesday, April 4th, 1905.

JOHN H. CAMPBELL, *Judge.*

TUESDAY, *April 4th, A. D.* 1905.

Title of Cause.

The parties hereto being present by their attorneys, respectively, it is ordered that this cause be, and the same is hereby, set for trial on Friday, April 15th, A. D. 1905, at 9:30 A. M.

JOHN H. CAMPBELL, *Judge.*

80 SATURDAY, *April 15th*, A. D. 1905.

Title of Cause.

This cause coming on regularly to be heard, C. L. Brown and E. S. Ives, Esq's, appearing as counsel for plaintiff, and Charles Blenman and Thos. Armstrong Jr., Esq's., appearing as counsel for defendant, and, thereupon, the Court, being now fully advised therein, does now overrule and disallow plaintiff's demurrer to defendant's cross-complaint; and does also overrule and disallow defendant's demurrer to plaintiff's complaint.

Whereupon the trial of this cause proceeded before the Court sitting without a jury (a jury having been expressly waived by both parties hereto), and, the plaintiff, to maintain on his part the issues herein, called as a witness J. L. Redondo, who was duly sworn, and examined and cross-examined; and introduced certain documentary evidence, which was filed as an exhibit herein, and thereupon plaintiff rested his case.

And, thereupon, the defendant, to maintain on his part the issues herein called as witnesses the following-named persons, to-wit: John Stoffela, P. B. Hodges, Magdalena C. Levy Heyl, and Ben C. Heyl, who were duly sworn, examined and cross-examined; and introduced certain documentary evidence, which was filed as exhibits herein, and thereupon the defendant rested his case.

And, the plaintiff, to further maintain on his part the issues herein, called, in rebuttal to the testimony on the part of the
81 defendant, as witnesses the following-named persons, to-wit: C. L. Brown, A. M. Foster, M. J. Nugent, Louis Levy, L. W. Alexander, John Stoffela, Thomas D. Molloy, and Henry Levy who were duly sworn, and examined and cross-examined; and introduced certain documentary evidence, which was filed as exhibits herein, and thereupon rested his case.

And defendant, to further maintain on his part the issues herein called, in rebuttal to the testimony on the part of the plaintiff, as witnesses the following-named persons, to-wit: John Stoffela, and Francis M. Riley, who were duly sworn, and examined and cross-examined; and thereupon rested his case.

The evidence being all adduced, and the case closed, it was agreed and ordered that the argument of this cause be submitted on written briefs, that of the defendant to be filed within ten days, and that of the plaintiff to be filed within ten days thereafter upon which said cause shall be considered fully submitted to the Court: and it was further stipulated by and between the parties hereto, that the decision and judgment of the Court in this cause may be made in any County in this District, and said decision and judgment may be sent to, and filed with the Clerk of this Court, and be entered and filed as of this date, and thereupon either party may be assumed to have filed a motion for a new trial, as either party may see fit; and that upon appeal to the Supreme Court either party may have
82 twenty days in which to file motions and papers and to perfect his appeal.

JOHN H. CAMPBELL, *Judge.*

BLURRED

Title of Court and Cause.

Judgment.

The issues herein having come on for trial at the regular term of the District Court of the First Judicial District in and for the County of Yuma, before the Honorable John H. Campbell, Judge, sitting without a jury, and the plaintiff having offered evidence in support of his complaint, and the defendant having offered evidence in support of his answer and cross-complaint, and the defendant having offered evidence in rebuttal and reply thereto, and due deliberation having been had, and the Court having made and filed its decision containing the findings of fact and conclusion of law, now, on motion of the attorneys for the plaintiff, it is

Ordered, adjudged and decreed

1. That the title of the plaintiff in fee simple and the right of the plaintiff to the possession of lots 4 in block 15 and 1 in block 21, in the town of Yuma, be, and the same hereby is established.

2. That the defendant and all persons claiming under him be, and they hereby are, barred and forever estopped from having or claiming any right, or title to said lot 4 in block 15, and the said lot 1, in block 21, adverse to the plaintiff.

83 3. That a certain deed executed by Magdalena C. Heyl and Ben Heyl, her husband, to the defendant John Stoffela, which said deed bears date the 9th of January, 1905, and is recorded in the office of the Recorder of the County of Yuma on the 9th day of January, 1905, in Book 21 of Deeds at page 76; and a certain mortgage executed by the said Magdalena C. Heyl and Ben Heyl, her husband, to the said John Stoffela to secure the sum of $5,700, which said mortgage bears date the 9th day of January, 1905, and was recorded in the office of the Recorder of the County of Yuma on the 9th day of January, 1905, in Book 6 of Mortgages at page 157 be, and the same hereby are, cancelled and declared to be of no effect whatever.

4. That the foregoing decrees are upon the express condition that on or before the 4th day of July, 1905, the plaintiff pay or cause to be paid to the defendant the sum of $15,700, less the sum of $600, together with $2.85 his costs in this action; and in case the plaintiff should fail to pay to defendant said sum less the sum of $600, and his costs aforesaid, on or before the said date, then this judgment shall be void and of no force and effect whatever.

Done in Open Court this 15th day of May, 1905.

JOHN H. CAMPBELL, *Judge.*

D PAGES

84 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Yuma.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFFELA, Defendant.

Notice of Appeal.

To John Stoffela, the above named defendant, and Charles Blenman and Thomas Armstrong, Jr., attorneys for said defendant:

You and each of you are hereby notified that the plaintiff, M. J. Nugent, in the above entitled action, hereby appeals to the Supreme Court of the Territory of Arizona from that portion of the judgment and decree therein entered in the above entitled Court, on the fifteenth day of May, A. D. 1905, which requires that said plaintiff shall pay to said defendant, on or before July 4th, A. D. 1905, the sum of fifteen thousand and seven hundred dollars less six hundred dollars, and costs, and in the event of said plaintiff's failure or refusal to pay said sum of money that said judgment and decree shall be null and void. Plaintiff also appeals from the order denying plaintiff's motion for new trial in said action.

Dated this 3rd day of July, A. D., 1905.

EUGENE S. IVES AND
C. L. BROWN,
Attorneys for Plaintiff.

Filed July 5, A. D., 1905.
THOS. D. MOLLOY, *Clerk.*

85 (Endorsed:) No. 891. In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Yuma. M. J. Nugent, Plaintiff, vs. John Stoffela, Defendant. Transcript on Appeal. No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent vs. John Stoffela. Transcript on Appeal. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

86 In the Supreme Court of the Territory of Arizona.

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

This cause having been heretofore submitted, and by the Court taken under consideration, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court in so far as

it imposes conditions precedent to the relief granted to the plaintiff, be and the same is, hereby reversed, and the case remanded to the District Court with directions to that Court to enter judgment absolute for the plaintiff.

It is further ordered, adjudged and decreed that the Appellant herein do have and recover of and from John Stoffela, Appellee herein, his costs in this court, taxed at Eighty-one and 5/100 ($81.05) Dollars, and his costs in the court below in this cause incurred.

SUPREME COURT,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the foregoing to be a full, true
87 and correct copy of the Order and Judgment made and entered by said Supreme Court on the 30th day of March, A. D., 1906, in the said above entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 24th day of December A. D., 1906, at Phœnix, Arizona.

[SEAL.] F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.

(Endorsed:) No. 891. In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Yuma. M. J. Nugent, Plaintiff vs. John Stoffela, Defendant. Remittitur. Filed this 26th day of December A. D., 1906, at no minutes after 2 o'clock P. M. Charles H. Utting, Clerk.

88 *Index to Reporter's Transcript.*

	Direct.	Cross.
Witnesses for Plaintiff:		
J. L. Redondo	89	
Plaintiff Rests	91	
Motion for Judgment by Defendant	92	
Denial of Motion	92	
Witnesses for Defendant:		
John Stofella	92	103
P. B. Hodges	118	119
Magdalena C. Heyl	121	128
Ben C. Heyl	130	134, 142
Defendant Rests	141	
Rebuttal:		
C. L. Brown	145	
A. M. Foster	149	150
C. L. Brown, recalled	151	162
M. J. Nugent	170	177
Louie Levy	178	181

L. W. Alexander 182 188
John Stofella, recalled 190
T. D. Molloy 190 192
Henry Levy 192 193
John Stofella, recalled 194 196
F. M. Riley 200
Stipulation 202
Reporter's Certificate 203

89 In the District Court, First Judicial District, Territory of Arizona, in and for Yuma County.

No. 891.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFELLA, Defendant.

Tried April 15, 1905.

Before Hon. John H. Campbell, Judge of Above Entitled Court.

Appearances:
Messrs. Eugene S. Ives and C. L. Brown, for Plaintiff.
Charles Blenman, Esq., for Defendant.

J. L. REDONDO, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. IVES:

Q. Mr. Redondo, are you a Notary Public?
A. Yes, sir.
Q. In Yuma County?
A. Yes sir.
Q. How long have you been a Notary Public? Have you been a Notary Public for the past year in this County and Territory?
A. Yes sir. I am a Notary Public now, and have been for 16 years.
Q. Continuously?
A. Yes sir.
90 Q. Will you look at that document in your hands, please, and state whose is the signature and acknowledgement ? Who purports to have signed that paper?
A. Magdalena C. Heyl.
Q. Do you know Magdalena C. Heyl?
A. Yes sir.
Q. Did you know her during the month of January, last past?
A. Yes sir.
Q. Do you know what Magdalena C. Heyl's name was before she was married?
A. Magdalena C. Levy.

Q. Did you see Magdalena C. Heyl sign that document, and did she acknowledge it?
A. Yes sir; I can explain——
Q. You took the acknowledgement?
A. Yes sir.
Q. What did you do with the deed after it was acknowledged?
A. It was turned over to Mr. Alexander.
Q. Of Nugent & Alexander?
A. Yes sir.
Q. Where did this occur?
A. At the store of Alexander & Co.
Q. On what date did it occur?
A. On the evening of the 4th of January, 1905?
Q. 1905?
A. Yes sir.

91 Mr. IVES: I offer this deed in evidence.

Mr. BLENMAN:

Q. You say you saw Mrs. Heyl sign the deed?
A. Well, I can explain the matter. I translated the deed to Mrs. Heyl before I took her acknowledgment, and I made her say whether that was her signature; she did; she said it was. When I arrived at the place, I translated the deed to her, and she acknowledged it before me.
Q. Was the deed in the same state it is now?
A. Yes; I am sure it was. There is no question about it. Yes sir.
Q. Was the money paid over in your presence?

Mr. IVES: I object to the question.
The COURT: The objection is sustained.
Mr. BLENMAN: I have no objection to the deed.
The COURT: It may be admitted in evidence and marked Plaintiff's Exhibit A.
Mr. IVES: The plaintiff rests.
Mr. BLENMAN: If the Court please, I move to have judgment on the pleadings. There is no evidence of the delivery of the deed, and the deed, on the face of it is recorded after our deed. That deed, your Honor will see, from the pleadings, is recorded at 2 o'clock, and the deed of Mr. Stofella was recorded at 11 o'clock in the morning. There is no evidence before your Honor but the execution of that deed. There is no evidence of the delivery of the deed, and there is no evidence that Stofella had any notice of the deed.
92 Therefore, I ask to have judgment on the pleadings.
Mr. IVES: I do not care to make any argument on the question.
The COURT: The motion for judgment on the pleadings will be denied.
Mr. BLENMAN: The defendant excepts to the ruling of the Court on the motion.
Mr. IVES: The plaintiff rests.

JOHN STOFELLA, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. BLENMAN:

Q. State your name?
A. John Stofella.
Q. You are the defendant in this action?
A. Yes sir.
Q. Do you know Mrs. Magdalena C. Heyl?
A. Yes sir.
Q. And state, Mr. Stofella, what business you were in with regard to the property known as Lot 1, Block 21, and Lot 4, in Block 15, in the Town of Yuma, in the month of January last?
A. Well, before, I get a mortgage on it—Lot 4 in Block 15, and Lot 1, in Block 21.
Q. You were the holder of a mortgage? What were you
93 going to say?
A. I be foreclose the mortgage.
Q. How many mortgages were there?
A. Two.
Q. And you foreclosed them?
A. Yes sir.
Q. When?
A. At the last term of the Court. I don't recollect exactly the date.
Q. Last December?
A. Yes sir.
Q. Now, about the 4th to the 9th day of January, 1905, how much was due you under these mortgages?
A. Before going to Sheriff's Sale, it was due me $16,042.88, including the Sheriff's sale.
Q. What was the last? Including the Sheriff's sale? What does that mean?
A. I mean, if it go to the sale.
Q. Well, how much was due you before the sale? The sale was fixed for the 10th of January, was it? Before the sale, the principal and interest and everything? How much was due you?
A. $15,682.88.
Q. $15,682.88?
A. Yes sir.
94 Q. Was the property sold by the Sheriff?
A. No sir.
Q. How was it that the property was not sold? What arrangement, if any, did you make with Mr. and Mrs. Heyl?

Mr. IVES: I object to the question.
The COURT: The objection is overruled. He may answer the question.

Mr. BLENMAN:

Q. State what you did, now, Mr. Stofella?

A. About on the 4th, I think, more or less on the 4th day of January, I meet Mr. Brown on the sidewalk down town.

Q. Which Mr. Brown?

A. The attorney. And he tell me, he said: Your money is ready. And I tell him: Mr. Brown, how much it is? So then I want to figure and see how much it is. So I said no matter; I am very busy, it don't draw any more interest, and I'll stop the interest. I said: I am very busy; I will be up tomorrow or next day. And he said: All right, John. The next day Mr. Brown, Mr. Alexander, and Mr. Henry Levy, he come to my store, and he say: John, you can go down and cancel the judgment; your money is ready. And I says: I be down tomorrow, sure. I am very busy; I be down tomorrow. And he says: All right. Next day he come up again, and he say: I tell you to come down at one o'clock. And I tell him: How much it amount to? Before I go, I want you to tell me how much? Then he figure, and finally he won't say how much
95 it is. He won't say nothing. And I figure up with Mr. Brown myself up to the store, and then he say: So much. And I say: I think it is too little; it is more than that, Mr. Brown. And he say: All right. I said: I be down at one o'clock. At one o'clock I go down to Mr. Molloy's office, and I meet Mr. Brown, and Mr. Alexander, and Louie Levy, and we fix things up on both suits, and we agree to $15,682.88; we agree on the figures. All right. Mr. Brown say: We will draw a form to cancel this judgment. At the same time he go out to draw it up, and I tell Mr. Molloy: You draw it up, and he say: All right. And he finally start to draw the agreement. Then Mr. Alexander he draw up a check and he make a mistake on the first check and it drop on the floor, and I take that check up and I look at that check and I see it is a personal check.

Q. What do you mean by a personal check?

A. His own check.

Q. Certified or uncertified?

A. Uncertified. So he make it out there a check for $15,682.88.

Q. What kind of a check?

A. The same kind.

Q. Was it certified or not?

A. It is uncertified. I tell him: That is the kind of check you give me? And he said yes: I give you that. And I say: No; you give me cash; I will not accept a personal check; it is too much chances for me. So I walk out of the office, and Mr. Alex-
96 ander he went down town, and he try to raise the money from P. B. Hodges, but he refuse to give him the money. So, on the 8th day of January, Mr. Heyl he come up on the house, and he says: Stofella, them people pay you the money? And I says: No; I don't see any money yet. And he says: We don't want to let that property go to the Sheriff's sale. And he says: You don't want to buy that property? And I says: What property you mean? And he says: lot 4, Block 15. And I say: No, it is too much. He want $10,500.00—$10,000.00 for the property and $500 go to a commission, because he got the property in the hands of some real

estate agent for sale, and he say he promised $500.00 commission I tell him: No; that is too much. He say he will come up that night again. I tell him: I think the matter over; I think the matter over, Mr. Heyl. So that night Mrs. Heyl she come up to my store. She want to talk to me. So she says: You see Mr. Heyl on the 8th day of January, on Sunday? Mrs. Heyl says: You see Mr. Heyl? I say: Madam, he was here today sometime. She say what kind of agreement you got with him? I say: I not got any agreement. I tell him I think the matter over. I says: I don't want this property; let him go. I says: I don't know. And finally I think the matter over, and I talk to my wife. Then I says: Mrs. Heyl, I give you a chance. This is my last proposition that I am going to make to you; if you can do better, all right. I will give
97 you $10,500.00 in cash, and pay up your commission, and I give you three years on Lot 1 in Block 21; I give you three years on condition that you put a deed in escrow, and the condition to go in the envelope. I don't want any more costs over this property. If you put a deed in escrow in the bank I give you three years. She walked outside; I said, at the same time: If you can do better, you better do it yourself. That is my last proposition. Mr. Heyl he told me before to see his wife. I did. This proposition she make to me. I say I will give you a chance. I say: You can sell if you can do better. He say: Who do you want to make out the paper. I say: Any man suit me. Any man can make out the deed and the mortgage. He say: Is Frank Baxter suit you? And I say: Yes; he suit me perfectly. I tell him Frank Baxter can make out the paper. He go out, and then he come and tell me that Mr. Baxter is somewhere down in the valley, and he said: You get somebody yourself to make out the paper. So I get an old man that staid around with me to make out the paper. He make out the paper.

Q. Who was that?

A. Oh, he is an old man that stay around with me. Mr. Baxter no make out the paper. So the old man make out the paper Sunday—no, between Sunday and Monday morning; and Monday morning between 8 and 9 o'clock Mr. Baxter he come up.

Q. Who is Frank Baxter? A notary public?

A. Mr. Heyl come up first, and he say: Mr. Baxter make
98 out the papers that suit you: I say: Yes. He come up and he turn over the deed and the mortgage to me, and he make out a receipt, and he want me to give a receipt for this judgment; for he says when you record this deed, you cancel all the mortgages, and you record that deed and record your mortgage, and I want a receipt so the judgment is cancelled. I tell him, That is all right I say: Frank, you make out a receipt, and he make out a receipt and I sign it, and come down town; that was about ten o'clock. He come down before me, and I come down in about ten minutes, or a half hour, anyway. I meet Mr. Baxter on the sidewalk. Now, I say: Let's go into the bank and deposit that deed. Then he close it up and write on the back of the envelope and turn that deed over

to the bank. I gave him a receipt and I get a receipt so they come in and I come in.

The COURT: What deed is this you are talking about?

The WITNESS: A. On the 9th, he came. He come to the Court House about 5 or 10 minutes before me, and I come in after. He was in the Justice of the Peace Office and I call him out. I call Mr. Baxter to come in the Recorder's office and I says anything against this property? And he look it up, and say: No. Nothing against it. So I say: We going to cancel these two mortgages, and I hand the mortgages to Mr. Baxter; I hand them up when he file my deed for Lot 4, Block 15, and cancel the two mortgages. Then I have a mortgage on Lot 1, Block 21, and I come out to Mr. Molloy's
99 office and cancel the judgment.

Q. Who was the judgment against?

A. Mr. and Mrs. Heyl, and against this property.

Q. Mr. and Mrs. Heyl?

A. Yes sir. Excuse me; the account on the mortgage for $5700.00 he don't come out exactly right and I give $17.10 to make him exactly $5700.00. I give the money on this Lot 1, Block 21, and Mr. and Mrs. Heyl give me a receipt for it.

Q. That was to make even money?

A. Yes sir. They give me a receipt for it.

Q. You say that was on the—what day was it that Mr. Alexander came to you with the uncertified check?

A. I think it was on the 5th.

Q. The 5th of January:

A. The 5th of January.

Q. Now, did he tell you at that time that he was Mr. Nugent's partner?

A. Yes sir; that is what I say outside. He is the partner of Mr. Nugent; he was agent.

Q. The agent of Mr. Nugent?

A. Yes sir.

Q. Did Mr. Alexander tell you at that time that he had a deed to these two properties?

A. No sir. The first time that I know Mr. Nugent had a deed it was the same day at 8 o'clock in the night, I was ready to
100 Close up the store.

Q. Which day, now?

A. The 9th day of January; The same day we file our deed and cancel the judgment.

Q. You say that was the first notice you ever had that Nugent had a deed?

A. The night of January 9, at 8 o'clock. Mr. Brown, and Mr. Nugent and Mr. Levy come up to my store and I was ready to close up. They come in and said: Give me a bottle of beer., I get in the beer. They sit down there and I put four glasses on the counter. I fill it up and I say: Mike, you want a glass of beer? And he said: I quit. How long ago? And he say: Oh, about six months. Finally, we was there talking and Mr. Brown said: You don't come down today like you promised. I say; Yes; I was down a while.

He say: John, I don't see you. I said: I don't need to see you, because Mr. Brown was attorney for Mrs. and Mr. Heyl before and after that and yet. I went down. Mr. Mike he say to me: You better come in and get your money. The property don't owe me anything. He never offer me the money before. I says: It's too late now; the property don't owe me anything. You got to go and see Mrs. Heyl about it. And then he said: I am sorry, John, we are going to sue you on that property. I said I am ready. I said: Don't serve papers on me tonight. He say: No; it is plenty of time. On Saturday, Mr. Levy he come up to my place and offer me that
101 house, and I tell him: No; it is too much money. I say: Henry, let Mrs. Heyl come up, and I ask them, because I hear a rumor on the street that the property was sold. I ask her: was the property sold? And she say: No, it is not sold. I ask Mr. Heyl. I said: You make any deal with anybody? And he say: No; you can go down and see in the Recorder's office. I don't find nothing against it.

Q. You went where?

A. To the Recorder's office, and there was nothing against it.

Q. That was when you made the search in the recorder's office?

A. Yes sir; on Saturday.

Q. Did you make any other search?

A. Well, I asked Mr. and Mrs. Heyl.

Q. I say in the recorder's office? How many times did you search there?

A. Monday, and on Saturday first; and on Monday before we file those papers.

Q. And you found nothing on record?

A. No sir; nothing on record. Mrs. Heyl tell me she don't make any deal; so Mr. Heyl tell me. I says: You make any deal with anybody? and he said: No. So that is the only two persons I can go by.

Q. Just look at that deed? (Handing witness paper.) Look at the signature?

A. Yes sir; that is the deed; that is Mrs. Heyl's signature, and Mr. Heyl's.

102 Q. Did you see them sign that deed?

A. I see them in my presence—No; I didn't see them sign it because Mr. Baxter, the Notary Public, he bring it to me and Mr. Heyl tell me that is his signature.

Q. Do you know her signature?

A. Yes sir.

Q. Do you swear that is his and hers?

A. Yes sir.

Mr. BLENMAN: I offer this deed in evidence.

No objection.

Deed admitted in evidence, and marked Defendant's Exhibit 1.

Mr. BLENMAN: I also offer in evidence the mortgage set forth in the pleadings.

No objection.

Mortgage admitted and Marked Defendant's Exhibit 2.

Mr. BLENMAN:

Q. Now, at the time you took those two deeds Mr. Stofella, and before you took them, did you have any notice whatever, expressed or implied, that Mrs. Heyl had signed another deed to this property?

A. No.

Q. I just ask you again; did you have any notice, expressed or implied, or in any way, that Mrs. Heyl had deeded away that property?

A. No sir; if I know the property was sold, and somebody buy I would not buy it.

103 Cross-examination by Mr. IVES:

Q. Mr. Stofella, you say you gave $17.10 to Mrs. Ben Heyl, or something like that; where was it you gave her that $17.10?

A. Up there in the house.

Q. When did you give it to her?

A. The 9th day of January; the same day they make out that deeds.

Q. Before or after the deed and mortgages were recorded?

A. I think it was before; I think it was before we settled all our account—before I record the paper.

Q. Well, you did it before the papers were drawn?

A. No sir; before it was filed.

Q. Well, didn't you state that you came out and met Mr. Baxter and he prepared the papers and you came right up here and recorded them?

A. No sir; the papers were already made; Mr. Heyl came up——

Q. Did Mr. Baxter prepare the papers?

A. No sir.

Q. Who prepared them?

A. The old man; we call him Askey.

Q. When did he prepare them?

A. Sunday night; I got down Monday morning before 10 o'clock.

Q. When did you tell them to prepare the papers?

A. Just as soon as Mrs. Heyl was satisfied with the deal; Sunday night.

Q. Now, the full amount due you under the judgment
104 which you had was $15,100.00, less that $17.10, was it?

A. The judgment owe me $15,682.88.

Q. Now, how was that made up? Was that all interest?

A. Everything included.

Q. What was included? The principal——

A. And interest.

Q. The interest; and what else was included?

A. That is all; the costs of the court, and everything up to that day.

Q. Were the taxes included?

A. I think—yes sir.

Q. Did you agree that you would pay the taxes?

A. Just as I got possession of the property——

Q. I ask you; did you, at the time, agree with them that you would pay the taxes?
A. Yes sir.
Q. Now, did you pay the taxes?
A. I went just as soon as——
Q. Did you pay the taxes?
A. I want——
Q. Did you?
A. No.
Q. You didn't pay the taxes?
A. No sir; because when I went to pay the taxes the taxes was paid; just as soon as—I just tell them, just as soon as I
105 file my deed, and I got everything agreed satisfactory, with Mr. and Mrs. Heyl, I went to pay the taxes and the County Treasurer tell me the taxes was paid. I say: Who pay? He say; By Alexander. I want to get a receipt for them for the County Treasurer——
Q. Now, Mr. Stofella, did I understand you to say that you asked Mrs. Heyl whether she had signed another deed?
A. I don't understand.
Q. I understood you to say in reply to Mr. Blenman, that you had no notice of any deed, because you asked Mrs. Heyl, and she said she didn't give a deed to any one else? Is that true?
A. Yes sir.
Q. When?
A. Sunday night.
Q. Did you ever ask her that before?
A. No sir.
Q. How many times did you see Ben Heyl before January 9?
A. Every day.
Q. Did you have talks with him?
A. I was talking with him; yes.
Q. Did you ever talk to Ben Heyl between the 4th—the 8th was Sunday—about buying this property?
A. To Mr. Ben Heyl?
Q. Yes sir.
A. He came up himself and offer me this property.
106 Q. When?
A. He came up on the 7th and ask me if Nugent pay me that money, and I tell him; No. Then he says: We don't want it; my wife sent me up here; we don't want this property to go to the Sheriff's Sale. You don't want to buy that property? Lot 4, Block 21? I tell him it is too much for it.
Q. Now, Mr. Heyl asked you if Mr. Nugent had paid the money; when was that; was it before or after Mr. Alexander offered you the check?
A. I think after.
Q. Mr. Alexander offered you the check of Nugent & Alexander?
A. Well, I never see Mr. Nugent.
Q. I mean the check was signed by Nugent & Alexander?
A. Yes sir.

Q. What did Mr. Alexander say to you when he offered you the check?

A. He don't say anything. I tell him we agree on the figure on both sides. I say that is all right. He draw that check and I say this the kind of check you give me? And he say: Yes sir. I tell him: I will not accept your check. I accept a certified check or cash. It is no use to talk any more, and I walk out of the office.

Q. Mr. Stofella, didn't you know at the time that Mr. Alexander offered you that check, that Nugent & Alexander were purchasing that property from Mrs. Heyl?

107 A. I don't know it. I never say anything more.

Q. Well, didn't you have some suspicion in your own mind?

A. No sir; I have not. If I have any suspicion, I won't buy it.

Q. What further talks did you have with Ben Heyl besides the one in which he asked you if Nugent paid you the money?

A. We are not very good friends, on account of closing that mortgage.

Q. You had some other talk with him about this?

A. Talk about this business?

Q. Didn't you agree to give him five hundred dollars if he got Mrs. Heyl to sign that deed?

A. I did not. I give it to pay the commission.

Q. Then you gave him $500.00 for his services in getting Mrs. Heyl to sign that deed?

A. No sir.

Q. Now, Mr. Stofella, who was present in the Clerk's office at the time you signed the release of that judgment?

A. Mr. Baxter was present, and myself; I could not recollect anybody else.

Q. Do you recollect Mr. Alexander coming in there?

A. When I released the judgment, Mr. Alexander was outside in this room, and Mr. Henry Levy was talking in this room.

Q. What did Mr. Alexander say to you then?

A. He never say anything to me.

Q. Didn't you say to Mr. Alexander at that time that you would not accept any money from anybody except Mrs. Heyl?

108 A. Not to my recollection; I never say anything. I remember Mr. Alexander and Henry Levy talking by himself. I came out from the Clerk's office and walk off after I release the judgment.

Q. Did Mr. Alexander offer you the money then?

A. He never did.

Q. Didn't Mr. Alexander lay the money on the table in your presence—a package of money there?

A. Mr. Ives, I never see there Mr. Alexander or anybody else lay any money on the table. I was too glad to get my money if I can.

Q. When you refused to take the check of Nugent & Alexander Mr. Stofella, didn't Mr. Alexander tell you that he would send in to Loss Angeles and get the money?

A. He didn't tell me so; he walked down to the Treasurer.

Q. How do you know he went to the Treasurer?

A. Because I walk out and Mr. Alexander passed me, and I went down by myself. After that I hear that he went in to the Treasurer and try to give the check to the Treasurer and he refuse him.

Q. Now, you say that you made diligent effort in examining the records in the Recorder's office, to see if there was anything else against the property before you recorded your deed?

A. Yes sir; I asked the Recorder.

109 Q. How many times did you ask him?

A. Saturday on the 7th, and Monday, the 9th, about 11 o'clock.

Q. Now, Mr. Stofella, why were you so anxious to look at the records in the Recorder's office to see if a deed was recorded? Wasn't you expecting to see a deed?

A. No sir; I wanted to know if there is anything filed on this property. I hear for the last six months that this property is sold, and I went in to see if there is anything against it. The only two persons I can depend on is Mr. and Mrs. Heyl, and the records; I don't go on what I hear on the street that they sold it.

Q. Now, what did you hear on the street?

A. I hear he got the property for sale.

Q. Did you hear that Mr. Nugent had bought it?

A. I never did.

Q. Or Mr. Alexander?

A. I never did.

Q. Now, Mr. Stofella, did you not, on the 5th or 6th of January, or on the 4th or 5th of January, meet Mr. C. L. Brown here on Main street, in Yuma, and say: "Mr. Brown"; or words to this effect: "Is it true that Nugent has bought that Heyl property." And Mr. Brown said to you: "Yes, he has a deed for all of it, and there will be no sale, and you will get your money"?

A. I tell you what Mr. Brown said to me. I meet him on

110 the sidewalk, and he say: John, your money is ready, over there. I think it was on the 4th. I says: How much it is, Mr. Brown? He won't say how much. He didn't say Nugent buy the property, or anybody else. I think maybe Nugent take a mortgage or somebody else. I say he didn't tell me; I was too glad to accept my money at that time.

Q. You say the reason you went to the Recorder's office was because you were afraid Ben Heyl might play some trick upon you; Mr. Heyl didn't tell you that the property had been sold?

A. No sir. I went to the Recorder's office on Saturday, because Henry Levy offer to sell me that property. I hear some rumor on the street, and I want to cancel my judgment for $15682.88; that is what it is. I want to know all about it before filing my deed. I can't go by the rumor on the street; I can't go by that story.

Q. You say you go by Heyl, and Mrs. Heyl and the Recorder's office?

A. Yes sir.

Q. Did they tell you the property had not been sold?

A. Yes sir.

Q. They told you that how many times?
A. It was on the 9th.
Q. On Sunday the 8th?
A. On Sunday the 8th, may be so. I see so many rumor
111 that I am afraid the property was sold, and I go down to satisfy myself before I cancel the judgment.
Q. Did Mr. Heyl tell you several times that no deed had been signed?
A. He tell me just one time. Only once; Sunday afternoon, the 8th.
Q. What made you go to the Recorder's office on Saturday?
A. Because I heard rumors on the street. Levy wanted to sell me that property himself, and he want me to take this Lot 4, Block 15, and I tell him: No.
Q. Did Mr. Heyl tell you that he thought the deed signed by Mrs. Heyl was not good because he didn't sign it?
A. If Mr. Heyl or anybody else tell me Mrs. Heyl sign a deed or I know Mrs. Heyl sign a deed, I would not buy it. I was too glad to accept my money.

Redirect examination by Mr. BLENMAN:

Q. Now, Mr. Stofella, you say that when you purchased the property, you agreed to pay the taxes for 1904?
A. Everything that is due on the property.
Q. You were to pay the taxes for 1904?
A. Yes sir.
Q. What was the agreement as to when you should pay those taxes?
A. Well, she didn't say when; but just as soon as I purchased the property, I went to pay, because the taxes was due.
112 Q. How long after the deeds were signed did you go to pay the taxes?
A. Right away after. I think it was the same day, the first time; then I went again.
Q. Did you make any offer in writing to pay those taxes?
A. Yes sir.
Q. Have you the writing with you?
A. Yes sir. (Witness produces paper.) I might have gone down the same day.
Q. Is that the writing that you handed the Treasurer?
A. Yes sir; it is. It is signed on the other side. This is the writing.
Q. What date is that?
A. On the 9th day of January; the same day I purchased the property. I went down to straighten things up.
Q. Whose signature is that on the back of it?
A. P. B. Hodges.
Q. You say he signed that?
A. He did; in my presence.

Mr. IVES:

Q. Was that offer made on the day it bears date?

A. Just after, when I filed my deed and mortgages.
Q. About what time of the day was that? About what hour?
A. I don't recollect the hour?
Q. 10, 11, 12, or what time? Was it in the morning or in the afternoon?

A. It was between 11 and 3; I guess 11; because at 11 I
113 was here, and at 4 o'clock I was at home; it was between that time.

Mr. BLENMAN: I offer this in evidence. I will read it. (Reads paper.)
Paper admitted in evidence, and marked Defendant's Exhibit 3.

Q. Now, you stated, in answer to Mr. Ives, that you paid Mr. Ben Heyl $500.00; will you explain exactly what that $500 was for?
A. Heyl tell me that the Levy property is in the hands of a real estate agent to sell; that is the reason I hear rumor around the town; he said: I am promise $500.00 to a man to sell the property.
Q. Promised who?
A. Some real estate man; he say he did promise him. He said I got to have $500.00 to pay my man. That is the only thing that was against the property. And finally I say No; I won't let him have it. So when Mrs. Heyl come up I feel kind of sore to lose the property. My wife says: Give him a chance. So I says: $500.00, more or less, I give it to you. So I treat you kindly, so I pay this money to Baxter and I get a receipt in my pocket.
Q. Which money?
A. This $500.00.
Q. You paid it to Baxter?
A. Because Heyl tell me to pay this money to Baxter, because he was busy in the store; and he fix the receipts there.
114 Q. Well, show me the receipts you have got there?
A. (Witness shows papers to Mr. Blenman. $17.10, that's make even money that I pay Mrs. Heyl; that make $517.10.
Q. Now, did you pay Mr. Heyl or anyone else any money for making this deal for you?
A. I never did; because Mrs. Heyl come up and beg me to do this; I intend to do this, but I prefer to have my money at that time.

Mr. IVES:

Q. After you heard that Mr. Nugent had this deed, did you tell him that you would accept the money and let him keep the property?
A. I never hear Mr. Nugent had a deed.
Q. You heard it on the street?
A. He tell me at 8 o'clock that night—between half past 7 and 8 o'clock; I was ready to close up the store; and I tell him: Nugent, the property don't owe me anything, because we make a deal; go and see Mrs. Heyl.
Q. He told you then that he had a deed to that property?
A. He did.

Q. Did you then say to him: If you will give me the amount of money due me I will turn the property over to you?

A. I tell him it is too late now; the property don't owe me anything.

Q. You have never offered to turn the property over to him if he would pay you the money?

A. No; I tell him to go down and see Mrs. Heyl.

115 Q. Answer my question. Have you ever, since you heard that Mr. Nugent had a deed to this property, offered to turn the property over to Mr. Nugent, if he would pay you the money that was due you on the old mortgage?

Objection. Objection overruled.

A. I want the Court to allow me to tell what I say to Nugent. I sent it to Mr. Heyl.

Q. Answer yes or no.

A. No; I didn't. I tell Mr. Nugent to go to see Mrs. Heyl. I say Mrs. Heyl is satisfied because I give full value. I could not sell this property over there if Mrs. Heyl is willing to sell to Mr. Nugent. I tell Mr. Brown and Mr. Levy to go to Mrs. Heyl.

The COURT:

Q. When was that?

A. On the 9th, after I file my deed and the mortgage. I said if Mrs. Heyl is satisfied, I accept the money.

Mr. IVES:

Q. Mr. Stofella, in whose handwriting is this letter to the County Treasurer of Yuma County, that is in evidence here (handing witness paper).

A. It isn't my handwriting; that is my signature.

Q. Whose handwriting is it?

A. The same man that staid around with me—the old man, Oscar Von Askey.

Q. And you delivered this to the Treasurer between the hours of 11 and 3 o'clock on Monday, January 9?

116 A. Yes sir.

Q. And you had no notice whatever that Mr. Nugent had a deed until 8 o'clock on Monday evening, January 9; your first notice that Mr. Nugent had a deed to this property was at 8 o'clock on the night of January 9?

A. Yes sir.

Q. Why, Mr. Stofella, if you had no notice that anyone else had a deed to this property, did you go through this formal proceeding of making a written demand on the County Treasurer?

A. I went, after I purchased the property, I went to pay the taxes, P. B. Hodges tell me the taxes is paid. That is all I know. He don't tell me that Mr. Nugent buy the property. He tell me the taxes is paid by Mr. Alexander; that is what the Treasurer tell me.

Q. When you had that paper written and presented it to the

Treasurer, wasn't your purpose to fortify yourself with some possible law suit with respect to this property?

A. I don't expect any law suit.

Q. Then why did you want any writing; or ask the County Treasurer—or make this demand in writing upon the County Treasurer? What was your purpose?

A. I wanted to show that I was there ready to pay the taxes.

Q. What was your purpose in wanting to show it?

A. Because I was the owner of the property, and I don't
117 see how somebody can pay the taxes. I wanted Mr. P. B. Hodges' writing to show that the taxes is paid.

Q. Isn't it a fact that you served this writing upon the County Treasurer and got his receipt upon it in order that you might have this paper to use in case there would be a law suit over this property?

A. I never thought about a law suit.

Q. Then what did you want with this?

A. I want to show Mr. Hodges that I was there to pay the taxes; that is all.

Mr. BLENMAN:

Q. Now, when you first went to the County Treasurer's office, did you have that paper with you?

A. No sir; I met the old man on the sidewalk, and I say——

Q. After you saw Mr. Hodges?

A. After I saw Mr. Hodges. I was ready to pay the taxes. I ask him to come in and make out a little notice. Mr. Hodges he tell me the taxes is paid. Then we make it out there.

Q. And Mr. Hodges told you that Mr. Alexander had paid the taxes for Mr. Nugent?

A. For Mrs. Heyl, I believe.

Mr. IVES:

Q. Did Mr. Hodges sign that at that same time?

A. Yes sir.

Q. Between 11 and 3 o'clock?

A. Yes sir.

Q. Did Mr. Hodges tell you who had paid the taxes?

A. Yes sir.

118 Q. So they had been paid by Mr. Nugent?

A. No sir; by Mr. Alexander, he said.

P. B. HODGES, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. BLENMAN:

Q. Your name is?

A. P. B. Hodges.

Q. What official position do you hold?

A. I am Treasurer of Yuma County, at the present time.

Q. Were you Treasurer of Yuma County in the beginning of the present year?

A. Yes sir.

Q. Do you recollect the taxes being paid in respect to Mrs. Heyl's property?

A. Yes sir; I remember.

Q. Who paid them?

A. Mr. Alexander paid the taxes for Mr. Nugent, for Mrs. Heyl by Mike Nugent. He says: I am paying the taxes for Mrs. Heyl, by Mike Nugent.

Q. When were they paid? Do you recollect?

A. Why, they were paid—I think they were paid on Saturday, January 7.

Q. Are you certain about that?

A. Why, yes sir; I am certain about that; I think I am; I think it is the 7th.

119 Q. (Handing witness a paper.) Do you recollect signing that paper?

A. Yes sir.

Q. Now Mr. Stofella came to pay these taxes?

A. He came on the 9th, my recollection is.

Q. You made that endorsement on his letter?

A. Yes sir; because I wouldn't receive it; the taxes had already been paid. I didn't think it was right. He says: I want you to understand I am here ready to pay the taxes. He had an old man there, and he wrote out that paper, stating that he was there to pay the taxes. I would not receive it on account of Alexander paying the taxes a day or two before.

Q. Do you recollect whether you told Mr. Stofella who paid the taxes?

A. Mr. Nugent—well, I can't say positively; I think I told him Mr. Alexander paid them for Mr. Nugent.

Cross-examination by Mr. IVES:

Q. Did Mr. Stofella say anything to you about why he wanted a receipt at that time?

A. No sir; he just came to pay the taxes; he said that he had purchased the property and he wanted to pay the taxes. I told him that the taxes had already been paid by Mr. Alexander, and I could not receive the money again for the taxes.

120 Q. Did you at that time have any talk with Stofella with respect to any possible purchaser who bought the property before he did?

A. On Saturday Mr. Alexander was there, and Louie Levy——

Mr. BLENMAN: We object to that.

Mr. IVES:

Q. Did you state to Mr. Stofella at this time, at the time you signed this receipt, about any conversation you had with Mr. Alexander or Henry Levy?

A. I don't remember that I did; only I told him that the taxes were paid.

Q. Did you say anything at all to Stofella or did he say anything at all to you about anybody else purchasing that property?

A. I believe he stated that he had purchased the property himself.

Q. Did he say he understood that somebody else had purchased it ahead of him?

A. No sir; I told him that Mr. Alexander had paid the taxes.

Q. Did you say anything else?

A. No sir; he came back and said: I am here to pay the taxes. I signed the paper; I didn't see anything wrong about it, so I signed the paper.

Mr. BLENMAN: It is admitted that the mortgages and judgment were properly satisfied? Will you admit that without bringing in the records?

Mr. IVES: Oh yes; we will admit that.

121 MAGDALENA C. HEYL, a witness called on behalf of the defendant, being first duly sworn, through the medium of Interpreter J. L. Dedondo, who was also first duly sworn, testified as follows:

Direct examination by Mr. BLENMAN:

Q. Your name is Magdalena C. Heyl?

A. Yes sir.

Q. You are the wife of Ben C. Heyl, sitting here?

A. Yes sir.

Q. Formerly Magdalena C. Levy?

A. Yes sir.

Q. At the beginning of last January, what property did you own in Yuma?

A. The one that I live in now, and the other one that is over on the other street.

Q. That is Lot 4 in Block 15, and Lot 1, in Block 21, of the Town of Yuma?

A. That may be so; I do not know the numbers. I only know it is this property and the other.

Q. At that time—at the beginning of January, 1905, who held the mortgages over those properties?

A. Mr. Stofella.

Q. Do you know, Mrs. Heyl, about how much was due to Mr. Stofella?

A. Yes sir.

Q. State how much?

122 A. I don't know now; I knew at the time. They were telling me, and I was accepting the proposition.

Q. What proposition did you accept?

A. When I was told what I was doing, I know then what I owed.

Q. What business arrangement did you agree to with Mr. Stofella with regard to these two properties?

A. I didn't have any business with him; I was only at his house

to find out whether it was his; Mr. Heyl had told me and I went over to inform myself, and I found it was so.

Q. What was so?

A. That he would give the amount I was giving for them.

Q. What amount?

A. $10,000.00.

Q. What was the $10,000.00 for?

A. For the property on Main street.

Q. Was that $10,000.00 a part of what was due Stofella on the mortgages?

A. Yes sir.

Q. What was done with regard to the balance due on the mortgages—somewhere about $5,000.00?

A. He told me that he wanted a mortgage on the other property.

Q. Did you mortgage that property to him?

A. Yes sir.

Q. I will hand you Defendant's Exhibit 1, (handing witness paper) which is a deed from you and Mr. Heyl to Mr. Stofella; is that the deed that you signed to that property to Mr.
123 Stofella for $10,000.00?

A. I suppose so, because there is my signature.

Q. I will hand you Defendant's Exhibit 2, which is a mortgage; and I ask you whether this is the mortgage that you and Mr. Heyl signed for the other property, for $5700.00? (Handing witness paper.)

A. I suppose it is the same.

Q. Now, did Mr. Stofella, in consideration of those two deeds, release any mortgages?

Mr. IVES: I object to that.

Mr. BLENMAN: I will withdraw the question.

Q. Now, at the time you signed those deeds, Mrs. Heyl, had you signed any previous deed to this property to any o[illegible]

A. Yes sir; there were other arrangements; yes sir.

Q. That is a Deed to Mr. Nugent?

A. I suppose so. I didn't give it to him; I gave it to Mr. Alexander.

Q. Under what arrangement did you give that to Mr. Alexander?

A. I can't explain unless I can see the instrument; it would be giving a long story about it. I can't recollect.

Q. What instrument do you want to see?

A. I don't wish to see any one; you can suggest which.

Q. I want you to tell the Court under what arrangement, if any, you gave that deed to Mr. Nugent—or Mr. Alexander, rather?
124 A. With short words, I can only say that I had sold them to him for the quant-y of the money that he was to release the property on.

Q. Was that deed given to Mr. Nugent on the condition that he was to release Mr. Stofella's mortgage?

Mr. IVES: I object to that as a leading question.

Mr. BLENMAN:

Q. State what you said to Mr. Alexander?

A. When Mr. Alexander made me the proposition I was satisfied and I did it.

Q. You were satisfied with the proposition Mr. Alexander made?

A. I have just said that he would give me all the money to clear the properties—for the two properties.

Q. Did Mr. Alexander ever give you any money to clear those properties?

A. To me—he did not give it to me; but he was going to fix it all up—to settle it.

Q. Did he settle it?

A. They say that Mr. Stofella didn't want to.

Q. Do you recollect the date that you signed the deed to Mr. Nugent?

A. I don't remember; but I think it was about the 4th or 5th.

Q. To whom did you give that deed?

A. All were there. You, (referring to the interpretor, Mr. Redondo), Mr. Alexander, Mr. Brown, and my sons.

Q. Did you ever receive any money from Mr. Alexander or Mr. Nugent with respect to that property?

125 A. No sir. I did not receive any.

Q. State, Mrs. Heyl, why you signed a deed to Mr. Stofella after having signed a deed to Mr. Nugent?

A. Because I didn't know whether I was doing wrong; I did not ask and it was not explained to me.

Q. What was not explained to you?

A. That I had made another deed and had sold the property to ony one else.

Q. Did you tell Mr. Stofella that you had signed a deed to Mr. Nugent?

A. No. sir; because he did not ask me; I could not say so.

Q. When you signed the deed to Mr. Stofella, had you sold the property to Mr. Nugent?

A. Yes sir.

Q. And was that sale to Mr. Nugent made on any condition?

A. Condition of what class? What kind did you wish to state?

Q. Why, anything about the purchase money mentioned in the deed?

A. Yes sir; sure; I had a certain time upon which to pay it back myself.

Q. Now, the purchase money in that deed is stated as $15,400 being paid to you? Did you receive that money, or any portion of it?

Objection. Objection overruled.

126 A. No, I did not receive any.

Q. Now, isn't it a fact, Mrs. Heyl, that this deed was given to Mr. Nugent or Mr. Alexander for Mr. Nugent, on condition that he would pay off Mr. Stofella's mortgages, and that the deed should not be used until he did?

Objected to as leading. Objection sustained.

Q. Did Mr. Alexander make this deal with you or was it Mr. Nugent?

A. Mr. Alexander.

Q. Now, state what he said to you when he made this first proposition to you?

A. I have already said it; that he was going to pay everything; that is what he said.

Q. That he was going to pay everything ?

A. The mortgages of Mr. Stofella.

Q. Was there anything said by you to Mr. Alexander about what was to be done with the deed, if he didn't pay the mortgages of Mr. Stofella?

A. I didn't say anything to him at all? A. No sir.

Q. Was anything said by you about what was to be done with the deed if the mortgages were not paid off?

A. No sir.

The COURT:

Q. Why did you give them the deed before they paid the mortgage?

127 A. Because the next day they were going to pay it, and they refused to receive the money. I trust in them that they would not do anything wrong.

Q. Did you ever tell your husband that you had signed this deed to Mr. Nugent?

A. No; because when he was about to sign it he went from me and said he was not satisfied with the conditions, and I had to sign the deed in his absence.

Mr. BLENMAN:

Q. What conditions was he not satisfied with?

A. I don't know what was it that disgusted him.

Q. What did he say?

A. That there were some conditions that he did not like.

Q. Didn't he say what the conditions were?

A. To me; no.

Q. In your hearing?

A. Yes sir; he spoke about some things there that I don't remember; something about the lots and the house; I think Mr. Brown was there present; I think he told Mr. Brown.

Q. You live in a portion of this property, do you not?

A. Yes sir.

Q. Is that the portion that you had already given a mortgage to Mr. Stofella on for $5700.00?

A. Yes sir.

Q. Now, since you signed that deed to Nugent, have you paid any rent to any one for that property?

128 Objected to as immaterial. Objection sustained.

Q. Has any rent ever been demanded by any one for that property from you?

Objected to as immaterial. Objection sustained.

Cross-examination by Mr. IVES:

Q. Will you concede, Mr. Blenman, upon the record, that the property — question was the separate property of Mrs. Heyl?

Mr. BLENMAN: Oh yes; yes sir.

Mr. IVES:

Q. Mrs. Heyl, you stated that you didn't know that you were doing a wong when you signed the deed to Mr. Stofella?

A. Yes sir.

Q. Isn't it a fact that you were advised that the deed was invalid because Mr. Heyl didn't sign it? Wait a minute; I will withdraw that. Isn't it a fact that you were told that the deed was invalid because Mr. Heyl didn't sign it? That he said to you, or that some one said to you——

A. Mr. Stofella asked me when he was over there; I don't know of anybody else I have seen.

Q. You say that Mr. Stofella told you; when was that?

A. When I went up there to see about the deal. He didn't ask me. He told me that Mr. Heyl had told him that he had refused to sign the deed, and I told him that it was so; that he didn't
129 sign it.

Q. When did Mr. Stofella tell you that?

A. When he was over there; I think it was on Sunday.

Q. Was that before you signed the deed to Stofella?

A. Yes sir; I signed it on Monday.

Q. Did Mr. Stofella ask you whether Mr. Heyl had signed the deed to Mr. Nugent which you had signed?

A. With these words he didn't ask me. He told me that Mr. Heyl had told him that he had refused to sign the deed.

Q. What deed?

A. The one that I had given to Mr. Alexander; I suppose that is the one.

Q. Now, Mrs. Heyl, did Mr. Stofella say anything after you told him that Mr. Heyl didn't sign the deed; did he say anything to you?

A. No; he didn't say anything to me.

Q. Did Mr. Stofella say anything to you about the validity of the deed? State whether or not the deed was good or bad because Mr. Heyl didn't sign it? Did he state anything about that?

A. No; he didn't say anything.

Mr. BLENMAN:

Q. Did you tell Mr. Stofella that you had signed the deed to Mr. Nugent?

A. No, because he didn't ask me.

Q. Did you say anything about a deed being in existence to Mr. Nugent?

130 A. No sir; there was nothing talked about it.

Q. The only thing that Mr. Stofella said then, was that Mr. Heyl had told him that he didn't sign any deed to Mr. Nugent?

A. Yes sir.

Q. Did Mr. Stofella put any questions to you as to whether you had made any deal with any one else about that property?
A. No sir.

Mr. IVES:

Q. I have asked this question before. Did anybody tell you that the deed which you had signed to Mr. Nugent was bad because Mr. Heyl had not signed it?
A. No; no one.
Q. Did Mr. Stofella tell you that the deed was not good because Mr. Heyl had not signed it?
A. No; he didn't say anything to me about the deed. He said that Mr. Heyl had told him that he had refused to sign.

BEN C. HEYL, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. BLENMAN:

Q. Your name is Ben C. Heyl?
A. Yes sir.
Q. You are the husband of Mrs. Magdalena C. Heyl?
A. I am.
Q. About last January, what was your position with refer-
131 ence to Mr. Stofella?
A. There was a judgment standing against me in the Court..
Q. For about how much?
A. Something over $15,000.00.
Q. What was that judgment for?
A. It was a judgment on some mortgages that I had signed with my wife on property here in this town.
Q. Did you sign the notes?
A. I did.
Q. About this time in January, 1905, had you any authority from your wife to act for her?
A. I had.
Q. With respect to what property?
A. With respect to all her property.
Q. Is that the property meant in the pleadings here, Lot 1, in Block 21, and Lot 4, in Block 15?
A. Yes sir.
Q. As agent for your wife, did you make any contract or deal with John Stofella?
A. I did.
Q. What was it?
A. I contracted a deal for the sale of Lot 4, in Block 15, and to place the balance of the judgment in a mortgage on Lot 1, in Block 21.
Q. That was carried out, Mr. Heyl?
A. Yes sir.
132 Q. Who made that proposal to Stofella?
A. I did.

Q. About when?

A. I think it was on Saturday, the seventh of the month.

Q. When was the Sheriff's sale on this property to be held? Was it on the Tuesday following—Tuesday the 10th?

A. Yes sir.

Q. When you made this proposal to Mr. Stofella, did he agree to it?

A. He didn't the first time; but he did afterwards. When I first went to see him, he didn't agree.

Q. After you saw Stofella, did you have a conversation with your wife about it?

A. I did.

Q. State what it was?

A. I stated what arrangement I made with Stofella and we agreed upon the price. She told me she wanted me to go ahead and consummate the deal.

Q. And you went back to Stofella?

A. I did.

Q. Were you at Stofella's store at any time with your wife?

A. No sir.

Q. What do you know of her being there?

A. She told me that she went.

Q. To Stofella's store?

133 A. Yes sir.

Q. Now, on Monday, the 9th, you say, this sale was carried out?

A. Yes sir.

Q. When you told your wife that Stofella was willing to agree to this proposal that you made, did she say anything about having already signed a deed to this property?

A. She did not.

Q. Did you have any knowledge or notice of any kind that she had signed a deed to Mr. Nugent?

A. I had heard it; yes.

Q. You had heard it?

A. Yes sir.

Q. Did you ask her whether she had signed it?

A. No sir.

Q. You didn't ask her?

A. No sir.

Q. Why didn't you ask her?

A. Because it was dissatisfactory to me, and for other reasons why I didn't ask her. I didn't pay any attention to it.

Q. Didn't you believe that she had signed the deed?

A. No sir; I didn't. I looked the matter up; it was not of record, so I paid no more attention to it.

Q. Now, did Mr. Stofella ask you whether she had signed it?

A. Yes sir.

Q. What did you tell Stofella?

A. I told him that to the best of my knowledge and belief

134 she had not.

Q. You never signed any deed to Nugent?

A. No sir.
Q. Did you sign a deed to Stofella?
A. Yes sir.
Q. Now, on Monday morning, did you go up to Stofella's store with your wife?
A. No sir.
Q. Where was this settlement made?
A. At Mr. Baxter's office.
Q. Was he a notary public?
A. Yes sir.
Q. And were you present when Stofella released the mortgages and the judgments?
A. I was not. Mr. Baxter represented me as my attorney; I told him to go ahead.
Q. Who?
A. Mr. Baxter.
Q. Were you present when Mr. Alexander offered Mr. Stofella that check?
A. No sir.
Q. You were not present then?
A. No sir.

Cross-examination by Mr. IVES:

Q. Did you, previous to the 9th day of January, ever see
135 the deed which Mrs. Heyl signed and gave to Mr. Alexander or to Mr. Nugent?
A. No sir.
Q. You never saw it?
A. No sir, I saw an agreement whereby the boys were to buy this property back; but the deed, never.
Q. When did you see that agreement?
A. Mr. Brown showed it to me in Mr. Nugent's presence in the Elks' hall.
Q. When?
A. The night of the 4th.
Q. Did they, at that time tell you that the deed had been signed by Mrs. Heyl?
A. I would not be positive. I am absolutely certain that they told me that she was ready to sign it and would sign it.
Q. Will you swear positively that they did not tell you that she had signed it?
A. No sir; I will not.
Q. Did you tell Mr. Stofella that they told you that she would sign the deed to Mr. Nugent before the 9th of January? That Nugent and Brown told you? Did you, prior to the 9th day of January, tell Stofella that Nugent and Brown or either of them, had told you that Mrs. Heyl was willing to sign the deed to Nugent?
A. I don't know that I did.
Q. Do you know that you did not?
136 A. No; I don't; I might have had some conversation about it.

Q. Did you have any conversation with Stofella about whether or not the deed signed by Mrs. Heyl alone, to Nugent would be good or bad?

A. I think not.

Q. Are you sure you don't know? Answer my question.

A. I am not positive. I asked my attorney about it. Stofella might have been present at the time. I was not very particular; I don't remember these things.

Q. You were of the opinion that the deed was not good without your signature?

A. Yes sir; I was.

Q. Didn't you tell Stofella that too?

A. I think not; no.

Q. Mr. Heyl, if the trade had gone through without trouble between Mrs. Heyl and Mr. Nugent, were you to receive any money out of it? Was Nugent to give you any money?

A. No.

Q. Did you get any money out of the trade to Stofella?

A. I did.

Q. How much?

A. I got $500.00.

Q. You got that money for your own use?

A. Well, that is my business, what I did with it.

Q. Answer my question?

137 A. No sir; I didn't; not all of it.

Q. For what use did you get it?

A. I used it for several purposes; for my wife and myself.

Q. When you got that money you had the right to do with it whatever you pleased?

A. Yes, it was my money.

Q. Now, did Stofella understand that you had got that $500.00 to do with it what you pleased?

A. I don't know whether he did or not.

Q. When you made the trade with him, a part of the agreement was that he should give you $500.00?

A. Yes sir; it was.

Q. Did you tell him that you wanted that $500.00 because you had to pay it to some real estate man for a commission?

A. No; I don't think I did. I told him that I had to pay a part of it; I didn't tell him all.

Q. You say that Mr. Nugent showed you the option that he gave at the time Mrs. Heyl signed this deed, whereby he gave the two sons of Mrs. Heyl, or rather the children of Mrs. Heyl the option to purchase this property back within two years, for the price he loaned upon it? Is that true?

A. No sir.

Q. What?

A. Mr. Brown showed it to me.

Q. What was that option?

138 A. I can't relate it word for word. Louie Levy was designated to represent the minor heirs, and any time he could purchase this property back.

Q. At what price? Was it for the amount of the mortgage?
A. Yes sir.
Q. Now, previous to that time, did you have any conversation with Mr. Nugent in which you said that you would consent to sign the deed, provided the option ran to Mrs. Heyl instead of to the children?
A. At that time?
Q. During such conversation?
A. Yes sir.
Q. What was that conversation, and where?
A. It was at the Elks' hall. We had a few minutes talk and I stated to him that I would agree to that.
Q. What was it you stated to him?
A. I don't remember all of it; the most of it was that the property should be deed—that my wife should have the privilege of purchasing back the property. That is about all of it.
Q. Didn't you tell Mrs. Heyl, previous to the execution of the deed to Mr. Nugent, that you would sign it if the option was given to her instead of to the children?
A. No; I don't think I did. I think I told her if the deed was satisfactory to me I would sign it.
Q. Didn't you make that one of your objections?
139 A. I don't know if that was brought up in the first place. I think I did.
Q. Do you know where this deed was signed?
A. No sir.
Q. Do you know where it was acknowledged?
A. No sir.
Q. Or delivered?
A. No sir.
Q. Between 7 and 8 o'clock, or about that time, in the evening of the 4th of January, last, were you present at the store of Alexander & Co.?
A. Yes sir.
Q. Was Mrs. Heyl there?
A. Yes sir.
Q. Who else was present?
A. I think Mr. Redondo, Mr. Alexander, Louie and Henry Levy, and Mr. Brown.
Q. Was the question of the execution and delivery of this deed discussed at that time in your presence?
A. It was not.
Q. Did you have any discussion at that time with Mrs. Heyl about the execution and delivery of that deed—at that time in the store?
A. I think not; no sir.
Q. Didn't you take Mrs. Heyl with you out into the warehouse, leaving the others in the office, and discuss this with her?
140 A. I don't remember. I didn't have any discussion with her.
Q. There was a discussion about the deed there?

A. No; not about the deed.

Q. But there was a discussion?

A. It was about an agreement between Nugent and me. She was perfectly willing to make all the changes I had asked for in this agreement that he was to make with the children, upon my stating it. I omitted something that Mr. Brown called my attention to in his conversation. It occurred to me that it should be in the agreement with Nugent and me. Somebody spoke up and said it was going that way, or not at all. I said I will not sign any deed, on this condition. They said your signature is not necessary. I took——

Q. When you said: "I will not sign any deed," weren't you about to say something else, when you caught yourself?

A. No sir; no sir.

Q. Didn't Mrs. Heyl tell you right there that she was satisfied with tne trade as it was then discussed?

A. I don't remember.

Q. And that she wanted it that way?

A. No sir.

Q. Wasn't the deed at that time right out on the desk in the office in plain sight, and didn't you see it?

A. No sir; I wasn't in the office; I staid outside of the office.

Q. Didn't you have it in your hands outside the office?

141 A. No sir.

Q. And you didn't know at that time that she had already signed the deed?

A. No sir.

Mr. BLENMAN:

Q. Did or did not Mr. Stofella understand that that $500.00, or a portion of it was to pay some commission?

A. Yes sir.

Recess Until 1:30. Case Called After Recess at 1:30.

The COURT: You may proceed, gentlemen.

Mr. BLENMAN: We offer in evidence, if the Court please, page 88 of the Judgment Docket of this Court, which reads as follows: Suit No. 871. Judgment Debtor, Magdalena C. Heyl and Ben C. Heyl; Judgment Creditor, John Stofella; Attorney for Judgment Creditor, Charles Blenman: Time entered, December 7, 1904, 10:30, A. M. Judgment for $14,056.42; and interest at 1½ per cent per month; and $18.25, costs; on Lot 4, Block 15 and Lot 1, Block 21. In Book 13, page 45, under the head: Satisfaction of Judgment is an entry: This judgment is satisfied by a deed on file with the papers of the judgment creditor, John Stofella; January 9, 1905. Thos. D. Molloy, Clerk.

Mr. BLENMAN: The defendant rests.

Mr. IVES: I should like to recall Mr. Heyl for some further cross examination.

142 The COURT: Mr. Heyl may be recalled.

BEN C. HEYL, a witness for the defendant, having been heretofore duly sworn, recalled to the stand for further cross examination, testified as follows:

Mr. IVES:

Q. Mr. Heyl, did you ever tell John Stofella, prior to the 9th day of January, last, that Mrs. Heyl did not sign any deed to Mr. Nugent or to any one else of this property in question?

A. I told him she did not, to the best of my knowledge and belief.

Q. Now, when I asked you this morning, whether you had told him that or not, you said you didn't remember; you have refreshed your recollection since then, have you?

A. No sir.

Q. Well, I asked you this morning whether you knew, yourself, whether she had signed this deed to Nugent, and you said you could not remember; you could not say positively; is that still your answer?

A. Yes sir.

Q. Well, without any positive knowledge on the subject, you told Stofella that to the best of your knowledge she had not?

A. Yes sir.

Q. What you told Stofella, then, was to the effect that you didn't believe that she had?

143 Objection.

Objection overruled.

A. I told Stofella that to the best of my knowledge and belief she had not; there was no deed recorded in the Court House to that effect.

Q. But as to whether or not she had signed a deed to Nugent that was not on record, you was not sure?

A. No sir.

Q. You didn't tell Stofella that you was sure she hadn't signed it?

A. Yes sir.

Q. Did he ask you whether she had signed it or not?

A. I don't know sir.

Q. How did you happen to tell him?

A. I don't remember the circumstances with regards to that particular thing.

Q. At the finish of the conversation the question as to whether or not she had actually signed the deed, in the conversation between yourself and Stofella, I mean, there was some doubt about it?

A. No; I didn't express any doubt in the matter. I told him I didn't think so; I had looked the matter up.

Q. You didn't think so because it was not on record? That was your reason?

A. Yes sir.

Q. Who was this real estate broker that you gave a part of
144 this $500.00 to?

A. That is my personal business.

Mr. IVES: I ask that the witness answer the question.

The WITNESS: I refuse to answer it.

The COURT: You may answer the question.

The WITNESS: I refuse to answer the question.
The COURT: Answer the question.
The WITNESS: *A*. To myself.

Mr. IVES:

Q. Did you pay a part of it to anybody else?
A. I did.
Q. To whom?
A. To my wife.
Q. Your wife was a real estate broker?
A. No sir.
Q. You testified today that you told Stofella that you were going to pay the whole or a part of this $500.00 commission to a real estate broker; I want to know who it was?
A. I didn't tell him anybody.
Q. Who was the one you referred to; the real estate broker; the one you had in mind?
(Witness hesitates.)
The COURT: You may answer the question.
The WITNESS: *A*. Myself.
Q. Isn't it a fact that the commission was to go to Mr. Riley who sits there in the jury box?
A. No sir.
145 Q. Isn't it a fact that you see him there, Mr. Heyl, and that you told an untruth this morning, when you told him that you would not put him on the stand to prove that you told an untruth?
A. No sir.
Q. Who was present, and to whom did you refer when you told him that you were going to give a part of this commission to a real estate man?
A. Myself.

Mr. BLENMAN:

Q. Now, Mr. Heyl, did you swear positively or not, that Mr. Stofella asked you whether your wife signed the deed?
A. No sir.
Q. Your reply to Mr. Stofella on that occasion was more in the nature of an answer to his query?
A. Yes sir.

Mr. BLENMAN: That is all.

C. L. BROWN, a witness called by plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. IVES:

Q. Mr. Brown, you are an attorney and counsellor at law, residing in Yuma, Arizona?
A. Yes sir.
Q. And you were such during the month of January, 1905?
A. Yes sir.

146 Q. During the early part of January, 1905, did you receive any instructions from Mr. Nugent with respect to the property in question in this action?

A. Yes sir.

Q. What were they?

A. On the 4th day of January, at about noon, I was at home, when the telephone rang, and I was informed by a member of my family that I was wanted at the telephone, and I answered the call. One of the firm of Alexander & Co. of this town was talking over the phone, and said that he wanted to see me at the store of Alexander & Co. immediately. I immediately went down to the store of Alexander & Co., where I found Mr. Alexander, and I think Mr. Henry Levy and Louie Levy, and perhaps some others. Mr. Alexander told me that Mr. Nugent, the plaintiff in this case——

Mr. BLENMAN: I object to this manner of giving testimony.

The COURT: The objection is sustained.

The WITNESS: Mr. L. W. Alexander——

Mr. IVES: Please wait for the questions, Mr. Brown.

Q. You had some conversation with L. W. Alexander?

A. I did.

Q. In pursuance of that conversation, what did you do?

A. I prepared a deed which has been offered and introduced in evidence here today at this trial, and also an option which was to be signed by Mr. M. J. Nugent, relative to this same property—the deed was for the conveyance of this property, and the option re-

147 lated to the same property.

Mr. BLENMAN: Was this option in writing?

A. Yes sir.

Mr. IVES:

Q. Please look at this paper, and state what that is? (Handing witness paper.)

A. This paper which I now hold in my hand is the paper which I designated as the option, which was to be, and was signed by Mr. M. J. Nugent.

Q. You prepared that paper and the deed which has been admitted in evidence?

A. Yes sir.

Q. In preparing these two papers, did you prepare them in accordance with instructions received by you?

A. Yes sir.

Q. From Mr. Nugent or his representative?

A. Yes sir.

Q. Now, is that paper signed by him?

A. It is signed by M. J. Nugent.

Q. Are you familiar with his signature?

A. Yes sir.

Q. Is it acknowledged?

A. Yes sir.

Q. By whom?

A. J. L. Redondo.
Q. Are you familiar with Mr. Redondo's signature?
A. I am.
148 Q. He is a Notary Public?
A. Yes sir.

Mr. IVES: I offer that in evidence.
Mr. BLENMAN: I object to the introduction of this document on the ground that it has nothing to do with the parties to this suit.
The COURT: For what purpose is it offered?
Mr. IVES: It is the consideration for the deed. Mr. Nugent paid this money.
The COURT: Do you avow that you will show that?
Mr. IVES: Yes sir.
The COURT: I think it is admissable. The avowal of counsel, is, I understand, that this is a part of the transaction of the giving of this deed?
Mr. IVES: It is a part of the consideration for the giving of this deed. This is a memorandum of agreement made on the 4th day of January, 1905, between M. J. Nugent, an unmarried man, of Yuma, Arizona, party of the first part, and Louis Levy, and all the other childred of Isaac Levy, of Yuma, the parties of the second part. It is:

For and in consideration of the sum of One Dollar, lawful money of the United States, in hand paid to the said party of the first part, by the said second parties, the receipt whereof is hereby confessed, the said first party hereby grants and gives to the said second parties, the right and option to buy the following described property, to-wit: Lot One in Block 21, and Lot Four, in
149 Block 15, all in the town of Yuma, Yuma County, Arizona, Territory, according to the official survey of the said town of Yuma; This right and option shall run for the period of two years and the consideration to be paid for the said property is the sum of $15,400.00, lawful money of the United States of America. In witness whereof, the said first party has hereunto set his hand on the day and date first above written.

(Signed) M. J. NUGENT.

Acknowledged on the 4th day of January, 1905, before

J. L. REDONDO,
Notary Public.

Document admitted in evidence and marked Defendant's Exhibit D.
Mr. IVES: I should like to withdraw Mr. Brown from the stand temporarily and have Mr. Foster called.
Mr. BLENMAN: I have no objection to that.
The COURT: You may do so.

A. M. FOSTER, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. IVES:

Q. What is your occupation, and what was it during the month of January, 1905.

A. I was working on the Yuma Sun, as manager.

Q. Do you know whether or not John Stofella was a subscriber to the Yuma Sun, during the month of January, 1905?

A. He was.

Q. About how long has he been a subscriber, if you know?

150 A. I expect ever since the paper started.

Q. Look at this paper, and see if it is a regular issue of the Yuma Sun? (Handing witness newspaper.)

A. It is.

Q. Can you tell on what date a copy of that paper was sent to Mr. Stofella, and how?

A. It was either on January 6th or 7th, that the paper is supposed to have been issued, on Saturday, but sometimes it is not mailed on Saturday morning.

Q. Do you remember on this occasion, whether it was issued on Friday or Saturday?

A. I could not remember.

Q. Mr. Stofella resides in the Town of Yuma, does he?

A. Yes sir.

Q. And he did at that time?

A. Yes sir.

The COURT: Where is this published?

A. In the town of Yuma.

Cross-examination by Mr. BLENMAN:

Q. How do you say the subscribers to this paper, including Mr. Stofella, get their papers?

A. At the post office here.

Q. Do you know how often Mr. Stofella goes to the Post office for his mail?

A. I do not.

151 Q. This particular paper, you say, is dated January 6?

A. Yes sir.

Q. Can you say whether Mr. Stofella got that paper or not?

A. No sir.

Mr. IVES: I offer this paper in evidence by reason of the fact that it has this item in it. M. J. Nugent has bought the Levy property, on the corner. The heirs have the right to buy it back at a stipulated price within two years.

Mr. BLENMAN: I have no objection.

The COURT: It may be admitted.

Marked Plaintiff's Exhibit C.

C. L. BROWN, having been previously sworn, recalled to the witness stand:

Direct examination continued.

Mr. IVES:

Q. You are familiar with the item in the newspaper?
A. I am.
Q. Is the description of the property as published in that paper the property affected by this law suit?
A. Yes sir; I think it is.
Q. It is adjoining the property that is in this lawsuit, and which is generally known as the Levy property?
A. It is quite commonly known as the Levy property. It is sometimes known as the Heyl property.
Q. Now, Mr. Brown, were you present when the deed signed by Mrs. Heyl, in evidence, and the option, also in evidence,
152 were signed, acknowledged, and delivered?
A. I was present when they were acknowledged and delivered.
Q. Well, now, please state who was present, where it was, what time it was, and what was said or done at the time?
A. The deed in question was acknowledged and delivered there at the store, of L. W. Alexander & Co., on the evening of the 4th of January, 1905, at about 8 o'clock p. m. The option in question was acknowledged and delivered about the same time, but I am not sure that it was at the same place, but it was subsequent to the execution and delivery of the deed.
Q. Well, now, who was present?
A. At the time of the acknowledgment of the deed Mr. L. W. Alexander, Louie Levy, Henry Levy, Mrs. Magdalena C. Heyl, formerly Mrs. Levy, and myself were present; and Mr. J. L. Redondo, the Notary Public.
Q. Was Mr. Ben Heyl there present also?
A. Mr. Ben Heyl was present there immediately after, or soon after Mrs. Heyl had acknowledged the deed on the same evening.
Q. Now, please state just what took place at that time?
A. As I said, I had prepared these papers on the day, of the 4th, in the afternoon, and we had an arrangement that we were to meet at the store of Alexander & Co. and have them executed. I met them there in accordance with the arrangement at about half past
153 seven o'clock. I think about half past seven. Mr. Redondo was invited to be present to take the acknowledgments of the parties. He was there, so we gathered in the office of the store of Alexander & Co., and discussed these papers. Mrs. Heyl asked a great many questions about the arrangements which were to be made, and the deed was read to her by Mr. Redondo, and explained to her. It was in Spanish. I don't understand Spanish very well; only a little. But it was explained, so far as all appearances were concerned; she asked questions and they were answered. The option was read to her and explained. She then was asked by the Notary Public, in my presence and in the presence of these other persons whom I have

named, with the exception of Mr. Ben C. Heyl, he was not at that moment present, whether the execution of the deed was her free and voluntary act, and the signature was her signature, and she said that it was, and she was perfectly satisfied with all the arrangements and they were all completed. The deed was then handed to Mr. Alexander, who is, and was then, a partner of the plaintiff in this case, and by him it was handed to me. The option was then signed, not just at that particular time, but it was signed and acknowledged by Mr. Nugent.

Q. Was Mr. Nugent at the meeting at the store?

A. Not at this time.

Q. Later on Mr. Nugent signed on the same day?

A. On the same evening, if I am not mistaken; Mr.
154 Nugent went away that night on the train.

Q. State what part Ben Heyl took in this conference; state what he said?

A. The deed as drawn up contains the name- of Magdelena C. Heyl, and Ben C. Heyl, her husband. It was my desire that Ben C. Heyl sign the deed also. I expressed my desire to Mr. Nugent that Ben C. Heyl sign the deed also. The deed was drawn in that way. After Mrs. Heyl signed the deed I went down town with the deed in my possession. I saw Mr. Heyl and informed him of the situation, telling him specifically that Mr. Nugent had bought all of this property, and that his wife had signed and acknowledged the deed to the same, and that I had it in my possession, and I requested him to sign it also; he demurred upon certain grounds, and said: Come and go with me and see Mr. Nugent; we will probably be able to adjust matters. We found Mr. Nugent in the Elks' hall in this town. We talked with him about the matter, and he and Mr. Heyl had some talk, in my presence, and we, that is Mr. Heyl and myself, then came back up to the store where these other parties were yet remaining, and Mrs. Heyl being there at the same time, and we then discussed the matter in the presence of these parties. Heyl objected to the option and wanted it to run in favor of his wife instead of the children. He also wanted certain privileges to be given to him in the backyard of these premises, that he might use it without any
rent, for vehicles that he had, and that they should not be
155 charged any house rent for the house where they now live.

Matters were all agreed to excepting the matter of the option; Mrs. Heyl was taken out of the office, if I mistake not, into the warehouse room, and talked to by—I am not sure—Mr. Heyl or her sons Louie and Henry Levy, as to the matter, and she said that she wanted it to remain as it was; she wanted the option to stand in the name of Louie Levy and the rest of the children, and she didn't want to make any change in it at all. Heyl said: I will not sign it. I said: It don't make any difference whether you sign it or not. It is all completed. It would have been satisfactory if you had signed it, but let it go." He then disappeared and left the store.

Q. In what manner did he leave the store?

A. Rather hurriedly, and as though he was not pleased with the situation.

Q. Now, Mr. Brown, what did you do after that in connection with the consummation of this transaction?

A. On the next day, I think it was, which was January 5, I was passing along on Main street, and I met John Stofella, the defendant in this action, and he spoke to me and said: Mr. Brown, how about this Heyl property? He says: This property that I have a mortgage on, and is advertised for sale. As I understand it, Mike Nugent has bought it. I remarked: Yes; Mike Nugent has bought it. He has bought all of this property and has a deed now for all of it.

156 Q. This was to Stofella?

A. Yes sir; on the day following; I think on the 5th of January; either on the 5th or 6th; I am quite sure it was on the 5th. I said: John Stofella, there will be no sale of this property. It was advertised to be sold on the following Tuesday—the 10th. I said: You will get your money all of it. There will be no sale. He said: All right. I think it was on the same day, I think in the afternoon, that Mr. Alexander, and I think Louie Levy and myself—I know that I was one of the parties,—I am quite sure there were three of us, in pursuance of the arrangement which had been made, went up to Mr. Stofella's store in this town, to see and to ascertain from him what the amount of his claims were upon this property, and to arrange some way to clear up these claims. We talked to him and told him what we came for. I did the most of the talking. I told him that Mr. Nugent had bought the property, all of it, and that we wanted to pay his claims, and satisfy the liens. There will be no sale, I said. He said: How much do — make it out. I said I have figured it out. I told him the figures; they were something less than the amounts stated this morning. He said: I don't think you are quite right. I said: Possibly not; but whatever the amount is we will be prepared to meet it. I said if you will come down today, we will talk this matter over and settle it up. He said: I want a little time to write to my attorney. I said: John,

157 there is nothing to write to your attorney about. It is only a matter of estimating what is due you. You can do that yourself. He said: Well, I want a little time to write to my attorney, and just as soon as I can hear from him, I will arrange with you about the matter. That, I think was on Friday, of the same week as the 5th of January. And so it passed on. Saturday morning, this matter being still unsettled, I went over to the store of Alexander & Co., having the deed in my pocket, and I conferred with Mr. Alexander about the matter, and I told him that we should get Stofella to close this matter up; that he was holding us off, and that the time of the sale was approaching, and that it should be closed up; so Stofella was visited by one of the boys from the store, and an arrangement was made by him with Stofella.

Mr. BLENMAN: I object to that statement.

Mr. IVES:

Q. Were you present?

A. Not when this arrangement was made.

The COURT: The objection will be sustained.

The WITNESS:

A. I was present on Saturday, the 7th day of January, at about the hour of one o'clock in the afternoon, in the Clerk's office in this Court House, the Clerk of the District Court, when Mr. Stofella met myself and Mr. Alexander, and I think Mr. Louie Levy, also, for the purpose of settling up the matters I have been mentioning. He satisfied his judgments and liens to clear up this property, in pursuance of this arrangement. Mr. Alex-
158 ander and Mr. Stofella had some talk there and then, as to how much his claim was, and I was informed that there was another little judgment which increased his claim, and of which I had not had prior notice. So then I stated that I was mistaken as to the amount. Alexander satisfied Stofella at one o'clock on Saturday, at the Clerk's office, as to what he should pay. Alexander then and there drew a check, signed by himself, as Nugent & Alexander, on the Farmers' and Merchants' Bank, of Los Angeles, California, for the full amount of Stofella's claim, as was due him, and especially all his claims and costs on these properties. I think the first check was faulty for some reason, so he drew another, and handed the second one to Stofella, who looked at it. In the meantime there had been some talk about what the form of the release should be. While this conversation was going on we arranged to have the papers drawn up. Stofella said: This is not a certified check. Mr. Alexander says: No. Stofella says: I want a certified check or the cash. Mr. Alexander said that if that was the position he took, he would get the cash. That was considered in the afternoon, and I advised Mr. Alexander to have the cash here on Monday morning, the 9th of January. I was at the store again on Monday morning, the 9th day of January, at the store of Alexander & Co., for the purpose of pressing this matter to a conclusion and getting it settled. I instructed the boys there, or Alexander, or Levy, or some of them there, to notify Stofella that the matter must be closed up. I was informed that after that instruction had been given that Mr.
159 Stofella would meet with Mr. Alexander and myself, would meet with us at the Clerk's office on that day, in this Court House, at 11 o'clock, to settle these matters all up and get his money. About 10 o'clock of that day, in the morning, I saw Stofella on the street down town, and I said to him: John, you will be at the Clerk's office at the Court House at 11 o'clock? We will settle that matter up about the Nugent property. He spoke rather indifferently about it. At 11 o'clock I came up for the purpose of discharging my duties in the matter. Mr. Alexander was standing in the door of the store across the street. He remarked that it was a very bad situation that I had gotten Mr. Nugent into. I asked what it was. He said: Don't you know what Stofella has done since this deed was given to Mike Nugent? *A.* I said: No; I don't. He said: He has gone ahead and gotten a deed for that property over on Main street, and a mortgage on this property for $5700.00. He had Mrs. Heyl and Heyl sign them both, and ours is not on record. So we had some further talk about the matter, and I expressed my surprise at the situation. We talked about what course we would pursue. On the even-

ing of the 9th, which was Monday, at about 7 or half past 7 o'clock, M. J. Nugent, Mr. Louie Levy and myself went up to the store of John Stofella in this town, where we found him. We went there for the purpose of finding out what was the occasion for this surprising situation. I asked, I think, for a bottle of beer; I wanted to be agreeable and sociable; we had the beer. I said: John, you
160 didn't come up to the Court House today, as it was arranged to do, and fix up about the mortgages and the liens. And he said: No. I said: I understand you have gotten a deed from Heyl and Mrs. Heyl for the property on Main street, and a mortgage on this other property. He said he had. I said: I am surprised that you have done this. You knew that Mike Nugent had all of this property. I said: You remember that you met me down on Main street, I think, on Thursday, the day following the Nugent deed, and you asked me what about the Heyl property? And I asked you: What Heyl property? *A* And you asked we whether Nugent had bought the property, and I told you that he had bought all of that property that you had liens upon, and had a deed for it. And I told you that there would be no sale. And you told me: Yes; I know you told me that. But, you said that the deed Mike Nugent has got is no good; it is not on record. I put mine on record, and there was no consideration paid for Nugent's deed, and Heyl did not sign it. That was about the end of our conversation.

Q. Do you know, Mr. Brown, what was the actual consideration for the deed from Mrs. Heyl to Mr. Nugent?

A. Yes sir.

Q. Please state what it was?

A. The actual consideration was that Mr. M. J. Nugent should satisfy Mr. Stofella's claims in full on all of this property; that Mr. Nugent should pay me some fees which Mrs. Heyl owed
161 me, as accruing out of legal advice and legal services, amounting to $50.00. Mr. Nugent should pay the taxes on this property for the years 1903 and 1904, and that he should give an option to the children of Mrs. Heyl, known as the Levy children, the same option which has been introduced here in evidence, an option to buy back this property.

Q. Now, Mr. Brown, you have resided at Yuma a number of years?

A. I have.

Q. Are you familiar with the values of real estate in Yuma?

A. Generally so; not especially.

Q. You keep yourself advised of sales and purchases?

A. I have a general knowledge of prices in this vicinity.

Q. Do you think you know the values of properties in town?

A. I think so, yes sir.

Q. What is the value of the two pieces of property—give the value of each separately—in question?

A. I think a fair and conservatice value of the property on Main street, which Mr. Stofella included in his deed from Mr. and Mrs. Heyl, that is, Lot 4, in Block 15, with the improvements upon it, is still and was then worth from $12,000.00 to $15,000.00, and the

property over on the corner, or the other property, Lot 1, in Block 21, is and was then worth from $20,000.00 to $25,000.00, and is now, with the improvements on it.

Q. You are more familiar with the facts of this case than
162 I am; if there is any question or fact that you think you would like to state, I wish you would state it; do you think of anything else? Otherwise, I shall ask the other parties to cross-examine you?

A. I was just thinking; I will answer in a moment. After I learned that Mr. Stofella had secured a deed and mortgage on these properties, I, acting in behalf of Mr. M. J. Nugent, took his deed and placed it on record on the morning of the day of the 9th of January. I placed it on record that day, and I wanted these matters closed up.

Q. Was there any secrecy maintained by Mr. Nugent or Mr. Alexander with respect to this deal, or the transfer of this property from Mrs. Heyl to Mr. Nugent?

A. No sir; not so far as I know.

Q. Do you know, as a matter of fact, that it was generally discussed in town that Mr. Nugent had bought this property?

A. I think it was.

Mr. BLENMAN: I object to that.

The COURT: The objection is overruled.

Cross-examination by Mr. BLENMAN:

Q. Then you didn't insert the true consideration in that deed?

A. I didn't insert all the consideration.

Q. Did you, or did you not, insert the true consideration in that deed?

A. I would say no.

163 Q. Now, who had possession of that deed on the day it was executed, or the night it was executed?

A. It was executed and delivered to me.

Q. And you went down town with it in your pocket?

A. Yes sir; I did.

Q. Did you see Ben Heyl?

A. I did.

Q. Did you produce that deed?

A. I did not; I hardly think I showed him the deed.

Q. Is it not a fact that all you told him was that the property was sold to Nugent; or that Nugent had bought the property?

A. It is not a fact. I had several conversations on the afternoon and the evening of the 4th of the month. He thoroughly understood that Nugent had bought this property, and all of the property, and that the deed was in his possession.

Mr. BLENMAN: I move that the answer be stricken out.

The COURT: Your motion is to strike out all of the answer?

Mr. BLENMAN: I move to strike out such portion of it as is not responsive to the question.

The COURT: Counsel should indicate what portion he desires stricken out.

Mr. BLENMAN: I move to strike out of the answer all but the statement: "It is not."

The COURT: The motion will be granted.

Mr. BLENMAN:

Q. Did you at any time produce that deed and show it to Mr. Heyl?

164 A. I don't think I did.

Q. Will you state your reason for not doing that?

A. I had no reason at all that I can recollect. There was nothing secret about it. The terms of the transaction were fully explained by me to Mr. Heyl.

Q. Did you ever produce that deed to Ben Heyl?

A. I never did.

Q. You never showed that deed, Mr. Brown?

A. I told him that it was done, but he never asked me to see the deed.

Q. Do you distinctly recollect that you told Mr. Stofella in so many words that Mrs. Heyl had signed that deed?

A. I told Mr. Stofella that Mr. Mike Nugent had bought all of this property, and that Mr. Nugent had a deed from Mrs. Heyl for the property.

Q. Signed by Mrs. Heyl?

A. I told him that Mrs. Heyl had deeded to Mr. M. J. Nugent this property—all of the property.

Q. When did you tell him that?

A. On the street, on the day following January 5, he stopped me on the street himself and asked me about the matter—how about the Heyl property.

Q. You were up to this time, and had been always, the attorney for Mr. and Mrs. Heyl?

A. I was at all times the attorney for them in some matters.

Q. You were the attorney for them in the law suit foreclos-

165 ing these mortgages?

A. I was.

Q. Had you seen Stofella on several occasions about that business for them?

A. I don't remember speaking to him about that business on any particular occasion.

Q. Did you tell Stofella when you saw him on the 5th of January, that you were acting as the attorney for Mr. Nugent?

A. I don't think that matter was mentioned at all. I don't recollect that I did.

Q. You didn't produce the deed? You didn't show it to him?

A. No sir.

Q. And you didn't record the deed until two o'clock on the afternoon of the 9th?

A. It was in the afternoon about 2 o'clock; I don't remember the exact minute of time.

Q. State your reason for not showing the deed to Mr. Stofella?

A. There was absolutely no reason why I should produce the deed to Stofella; Stofella and I talked about the matter and he

didn't ask to see the deed. I don't recollect that I even thought of any reason, because it was our purpose to get this matter closed up, for him to have his money, for Nugent to have the property, and for the children to have the benefit of the option.

Q. As a lawyer, don't you think you could have got this matter settled up with him more quickly if you had produced this
166 deed to Stofella?

A. Had I known all this trouble was coming up, possibly, very probably, I would have shown him the deed?

Q. You heard Stofella's testimony this morning that no one told him that this deed had been signed by Mrs. Heyl?

A. Yes sir; and my testimony is that I told him specifically about the existence of the deed; that Nugent had a deed of all this property. I think I had it at the time, acting for Nugent in the matter.

Q. Did you ever tender to Stofella the amount in cash due him?

A. I never tendered it to him.

Q. You never saw anybody else tender him the cash, did you?

A. I was not present when the tender was made. That was on Saturday, the 7th of the month.

Q. As a lawyer, do you call that a tender?

Mr. IVES: I object to the question.

The COURT: The objection is sustained.

Mr. IVES:

Q. From the day after the execution of the deed to Mr. Nugent, did you, as the representative of Mr. Nugent, use any diligence to get Mr. Stofella to close the transaction up?

A. I did. All the diligence at my command.

Q. You were trying all the time?

A. Yes sir; knowing that the day of the sale was approaching.

Mr. BLENMAN:

Q. How was he to settle it?

A. I was trying to get the matter in shape so that he could
167 get his money, but he held us off for two or three days. I wanted——

Q. Did you ever offer him any money?

A. I never had any money.

Q. Isn't it a fact that Mr. Stofella—all he had to do was to receive the money?

A. No sir.

Q. Isn't it a fact that he never had any money offered to him?

A. I don't know.

Mr. IVES:

Q. Mr. Brown, from the time you had your first talk with Mr. Stofella, after the execution of the deed, I mean the deed to Mr. Nugent, of course, were you making efforts to have another interview in order to ascertain the amount due him?

A. Yes sir; and I did have other interviews.

Q. I believe you stated that he was unwilling to name any figure until he could write to his attorney?

A. Until he could write to his attorney. Yes sir. I suppose he meant Mr. Blenman.

Q. You said that a part of the consideration for the deed from Mrs. Heyl to Mr. Nugent, was the payment to you of certain fees due you from Mrs. Heyl?

A. I did. And also to pay the taxes on the property. I was present when the taxes were paid. Mr. Alexander and myself, in pursuance of that understanding with Mrs. Heyl, went down to the Treasurer's office and paid the taxes for the two years;
168 that was done on behalf of Mr. Nugent.

Q. After Mr. Stofella refused to accept the check of Nugent & Alexander, did you see Mr. Alexander making any effort to get the money from Mr. Hodges, the County Treasurer?

A. I know what Alexander told me.

Q. Did you have any talk with the County Treasurer himself?

A. Yes sir; he spoke to me about whether he should let Mr. Alexander have the money. I advised him not to do it, as District Attorney of the county. I didn't think he should do that kind of business.

Q. You advised Mr. Alexander to send in to Los Angeles for the money?

—. Yes sir; after trying to get the money here. He couldn't get that much cash around Yuma, and there was no other way to get the money.

Q. Do you know whether Ben Heyl had seen the deed to Nugent before you had the talk with him in the Elks Club?

A. No sir; I could not say that he saw the deed. I think that at the time Mr. Heyl was in the store on the occasion I have referred to, just after the deed had been acknowledged before Mr. Redondo by Mrs. Heyl, I think at that moment the deed was still lying on the table in front of Mrs. Heyl, but I would not say that Mr. Heyl saw the deed.

Q. The matter in the conversation was with respect to the form of the deed, and with respect to the option and the other matter?

A. The matter in the conversation was with respect to the
169 option, and other matters; yes sir.

Q. At that time, his seeing the deed was a matter of no consequence?

A. That is correct. The deed was discussed, and I told him then and there that I had drawn the deed in his name and in his wife's name. I told him I preferred that he would sign it. We discussed the legal situation, and I told him that his signature was not necessary.

Q. Did you ever have any conversation with him after that and before the 9th of January with respect to it?

A. I did.

Q. State what it was?

A. I am not sure; but it was on the day, perhaps, following; that would be the 5th, Heyl was talking to me about this transaction of

Mr. Nugent buying the property, and he suggested to me the feasibility, or advisability of myself and himself getting Stofella to buy the property over on Main street. I remarked——

Q. Did he say anything at all about money?

A. There was something said—that we could get money, or something out of it. I said: Mr. Heyl, Mr. Nugent has bought that property and the matter is entirely closed up. We have no right to make any proposition to anybody else.

Mr. IVES: That is all.

Mr. BLENMAN: I have no further questions.

The COURT: You may call the next witness.

170 M. J. NUGENT, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. IVES:

Q. Are you the plaintiff in this action?

A. I am.

Q. Previous to the 4th day of January, 1905, or on that day, did you give Mr. Brown any instructions with respect to the property in question here, and if so, what were they?

A. I told him that I was going to buy this property and that I wanted him to look out for my interests.

Q. Did you tell him to prepare the papers?

A. I did.

Q. Did you tell him what the arrangement or agreement between yourself and Mrs. Heyl was?

A. I did.

Q. You have seen these papers—the deed and the option?

A. I have, yes sir.

Q. The deed and the option as they stand embody the instructions you gave Mr. Brown.

A. They are the same.

Q. Now, Mr. Nugent, what was the consideration to be paid by you to Mrs. Heyl for the deed to that property?

A. Probably I had better tell it in my own way. After the judgment was rendered here, between that time and the time I got this deed, the boys, I am speaking of Henry Levy and Louie, the children of Mrs. Ben Heyl, had been to me two or three
171 times and wanted me to satisfy this judgment over here; Mr. Alexander had come to me and told me it was the wish of the children that I should do that. The situation didn't look very encouraging on the 4th day of January. The property was to be sold on the following Tuesday, I believe on the 10th, and Mr. Alexander came after me, and wanted me still to satisfy this judgment in Court, and take the property. It was humiliating to Mrs. Levy and the children to have the property sold over their heads. I told them I would not take the property as mortgagee, but if they would sell the property to me outright, they could collect the rents and pay me interest out of it, and that way I would take it. The boy spoke up and wanted to know how that could be done. I told

them I would give them an option to buy the property back, and they could give me a deed, and I would satisfy the judgment and pay what other bills would be against the property, such as taxes, etc. So they talked to their mother about it, and told her the conditions upon which I would satisfy the judgment. She was perfectly willing, and said that any way would suit her so she could still retain the property. So I—that was in the afternoon of the 4th of January, so while I was down town just after lunch, Mr. Alexander had, on my request, telephoned to Mr. Brown to come down and make out the papers as everything was satisfactory to the people interested; so I didn't do anything more with it only the signing of the option. About a quarter to 8 o'clock that
172 night, down in the Elks' hall, Brown and Heyl came into the room; Mr. Brown came to one door and called me out before the meeting of the lodge—I was presiding officer—it was about a quarter to 8 o'clock, before we had opened up the lodge; and he called me outside and said: We have come down here to talk over the transfer of this property this Levy property.

Q. Ben Heyl was present at this time?

A. Yes sir. Ben Heyl came up to me, and he said: Yes, I see you have bought her property; I says: Yes; I have. Well, he says: The first I know of it, the boys said they didn't care whether I signed the property or not.

Q. The property?

A. The deed to the property, I mean; so long as their mother has. I said: Ben, I would rather see you sign the deed. I also instructed Brown to have Ben sign the deed. I said: I would rather see you sign it. Well, he said, now I will tell you under what conditions I will sign it. So he enumerated the conditions. The shed that was rented to Sanguinetti up to September 1st, he didn't want me to collect any rent on that at all, after that date. I told him: All right. He said he would hold the place where they lived and they wanted that rent free. I said: There will be enough rents on the outside to pay up. Then he wanted the option to run to Mrs. Levy instead of to Louie and the children. I said: I can't do
173 nothing to that: I cannot make any arrangement about that, because those were the conditions upon which I was to get the property. So then Brown and him went away. A little after 10 o'clock Brown and the boys came down to the room and told me that after he got up there he would not sign the deed because I would not make the option to suit him. I don't know any more about this transaction. I went away and I told Mr. Brown to look after my interests, and I told Mr. Alexander that any financial aid Mr. Brown wanted in the matter to see that he got it.

Q. You say you left word with Mr. Alexander to furnish money to close the transaction?

A. Yes sir; I told him that Mr. Brown would attend to the legal part, and that I had instructed him what to do.

Q. As a matter of fact, did you have funds immediately available to carry out the transaction?

A. Yes sir; a great deal more; my bank account will show that.

Q. What bank?
A. The Farmers' and Merchants' Bank.
Q. To the credit of Nugent & Alexander?
A. Yes sir.
Q. More than $16,000.00 or $17,000.00?
A. Yes sir, more than that.
Q. Your books would show more than $17,000.00?
A. Yes sir; yes sir. Now, then, I don't know any more about it at all. I had got home on the morning of the 8th—Sunday
174 morning—from El Paso, and of course, it being Sunday, there was nothing done. Mr. Brown told me the progress he had made, and Mr. Alexander showed me where he had got the money from Los Angeles.
Q. What did he show you?
A. It was currency.
Q. How much was there?
A. About $16,000.00.
Q. Was it more than this claim?
A. Yes sir.
Q. When was this?
A. Wednesday morning, the 8th of January. He says: I wish you would go in there and count it. I took the bundle of money before any one else had broken the seals, and went into the warehouse and counted it. I gave him a slip of paper; I took that out of the package; it was $16,000.00 and I gave it to him.
Q. To whom?
A. To Mr. Alexander. I said; that is the amount we owe on the property, according to your figures.
Q. What did you tell Mr. Alexander, if anything, to do with the money?

Objection. Objection sustained.

Q. Do you know what Mr. Alexander did with the money?
A. He said it was to be used for that purpose.
Q. The exact sum which was necessary to pay Stofella?
175 A. No; not Stofella; to pay the judgment.
Q. That Stofella held? All the judgments?
A. Yes sir; all; they were all figured up.
Q. That precise amount which he said was due?
A. Yes sir.
Q. Now, Mr. Nugent, Mr. Brown states that on the evening of the 8th of January; on the 9th, I mean——
A. It was Sunday morning I seen this. Monday morning I asked what effort had been made, to have this thing closed up. I said: Tomorrow will be the day of the sale, and I would rather see it settled. Mr. Alexander spoke up and said——
Mr. BLENMAN: Don't tell anything that was said, unless Stofella was present.
Mr. IVES: Well, what was done?
A. Well, there was nothing done. He gets the money ready to be over here at one o'clock, according to arrangements to pay this judgment.

Mr. BROWN:

Q. It was 11 o'clock?

A. Well, it was sometime that day; I don't just recollect the hour. I was to take the money over here to satisfy the judgment. Mr. Alexander told me that Stofella had promised to meet him up——

Mr. BLENMAN: I move to strike out what Mr. Alexander told him.

The COURT: That may be stricken out.

Mr. IVES:

Q. Well, then there was nothing done?

A. I had only heard rumors that Stofella had——

176 Mr. BLENMAN: Never mind stating rumors, Mr. Nugent.

Mr. IVES:

Q. What did you do that evening?

—. Mr. Brown, Louie Levy and myself went up to Stofella's store and Mr. Brown walked in and something was said about a bottle of beer; I wasn't drinking it myself. Mr. Brown told him: He says: I understand you took the deed and mortgage for the Levy property. He says: Yes, I did. Well, Brown says: That is kind of funny, ain't it? After the talk we had about the property. And he says: What talk? Brown then said: John, don't you remember of my meeting you on Friday morning, the 5th of January, and telling you that Nugent (pointing to me) had all the property? Yes, he said: But Ben Heyl didn't sign the deed to the property, and it was no good.

Q. You say he didn't sign it; you mean what?

A. I said the deed.

Q. You said also that the property was no good?

A. No; he said the deed was no good because Ben Heyl didn't sign it. Well, Mr. Brown told him: That is a matter of law. Of course, I can't settle it with you, but it will be settled. Stofella said: Well, you will never get that property; that is mine.

Q. Did Brown state then to Stofella, in your presence, that he, Brown, had previously told Stofella that he had a deed for the property—that you had a deed for the property?

A. Yes sir.

177 Q. What did Stofella say after that?

A. He said it was no account because Ben Heyl's name was not on it.

Q. Did Stofella admit or deny that Brown had told him on the 5th day of January that Mrs. Heyl had executed that deed to you?

A. He said he did not remember of Brown stating that.

Mr. BLENMAN:

Q. Did you ever have the deed signed by Mrs. Heyl in your custody or possession?

A. For a few minutes only; just to look over it.

Q. You never produced it to anyone then?

A. No sir; no; I was leaving that night.

Q. You were here on Sunday?
A. Yes sir.
Q. And here Monday?
A. Yes sir.
Q. And you never told Stofella that you had that deed?
A. No sir.
Q. You never told anyone?
A. Yes sir; it was the common talk of the town.
Q. Did you tell it?
A. Yes sir.
Q. That the deed was signed by Mrs. Heyl?
A. Yes sir.
Q. Now, on that Monday night, when you were at John Stofella's what time was it?
178 A. I guess it was about half past seven or eight o'clock. I don't know exactly what time it was.
Q. Didn't Stofella say that night that he didn't believe that Mrs. Heyl had signed that deed?
A. No.
Q. He never did?
A. No, he never did; he never said nothing.

Mr. BLENMAN: That is all.

LOUIE LEVY, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. IVES:

Q. What is your name?
A. Louie Levy.
Q. You are a son of Mrs. Heyl?
A. Yes sir.
Q. Were you present in the store of Alexander & Co. on the 4th day of January, 1905?
A. Yes sir.
Q. In the office?
A. Yes sir.
Q. Who was present at that time?
A. Mr. Brown, my brother, Henry Levy, Mr. Alexander, my mother, Mrs. Heyl, and Mr. Redondo, the notary public.
Q. Well, at that time, was this deed which was signed by your mother to Mr. Nugent there?
179 A. Yes sir.
Q. Where was it?
A. On the desk.
Q. Had it at that time been signed?
A. Yes sir.
Q. Well, now, did Mr. Ben Heyl come there during this conference?
A. Yes sir.
Q. State what occurred while Ben Heyl was there?
A. Mr. Brown and Mr. Heyl came in, and we told him that Mrs.

Heyl had signed the deed, so he immediately took her out in the warehouse; I don't know what he said to her; I did not hear. He seemed to be perfectly satisfied that the deed should stand as it was. Some one told him to sign it and he said he wouldn't sign it unless the option was changed.

Q. Did he say what change he wanted in the option?

A. Yes sir.

Q. What was it?

A. He said he wanted the option to read in Mrs. Heyl's name instead of me and the children.

Q. What happened then?

A. He said if it wasn't changed, he wouldn't sign it. I think Henry got up to sign it, but it wasn't necessary at all for him to sign it. I think Henry said it wasn't any difference whether Mr. Heyl signed it or not. He seemed to be very angry about it and he walked out.

180 Q. Well, did you ever have any conversation with Stofella or hear any conversation with Stofella between that time and the 9th of January?

A. Mr. Nugent and Mr. Brown and I went up there Monday night.

Q. That was after. You didn't have any before that; before the deed of Stofella was signed and put on record?

A. Yes sir.

Q. What was that conversation?

A. Mr. Alexander and Mr. Brown and myself went up there——

Mr. BLENMAN:

Q. When was this?

A. That was on Saturday morning. Mr. Brown said that Mr. Nugent was ready to satisfy the mortgage, and for him to come down; that we were ready with the money. Mr. Stofella said that he would be down but that he wanted to write to his attorney to find out something.

Q. Was there anything said at that time about the deed that your mother had already signed to Mr. Nugent?

A. Mr. Brown told Stofella that Mr. Nugent had bought the property.

Q. What did Stofella say to that?

A. Well, he said he would figure his account and see what was due, and come down later.

Q. Did you ever have any other conversation with Stofella, or were you present at any other conversation?

A. On Monday night.

Q. Who was present? Tell what occurred?

181 A. Mr. Brown and Mr. Nugent and myself were there Monday night between half past seven and eight o'clock, and we had a bottle of beer.

Q. What conversation was had?

A. Mr. Brown said to Stofella: You didn't come down today, John. John said: No; I didn't. I understand you have got a deed to all of this property when it was already sold and has a mortgage on it. Well, you know it is no good—your deed, Stofella said. Mr.

Brown asked him if he didn't remember a day or two before that he had met him on the street and he told him that Nugent had bought all of that property. He said that he remembered when Mr. Brown met him on the street and told him that Mr. Nugent had bought the property.

Q. What else did Stofella say about it, if anything? Did he say anything with respect to the fact whether Ben Heyl had signed the deed?

A. He said that Mr. Nugent's deed was no good; that Heyl had not signed the deed, and that it was not on record, and he said: Finally I will get hold of all that property myself.

Cross-examination by Mr. BLENMAN:

Q. Stofella made that remark about the deed being no good after Mr. Brown told him that he had a deed signed by Mrs. Heyl to Mr. Nugent?

A. Yes sir.

Q. That is when Stofella made that remark?

182 A. Yes sir.

Mr. IVES:

Q. Now, just state, in order that there can be no confusion about it, state the parts of the conversation that led up to the statement that the deed was no good because Mr. Heyl did not sign it?

A. I don't exactly remember. Mr. Brown said that Mr. Nugent had bought the property, and of course, had a deed for it.

Q. Did Mr. Brown say anything to him about the conversation that he and Stofella had on the street?

A. Mr. Brown said to Stofella: Do you remember the other day you spoke to me on the street, and asked me what about this Heyl property? And Stofella said: Yes, I remember. Mr. Brown told him that Nugent had all the property. That he had bought it. Stofella said that he remembered it perfectly.

Q. And now, was it at this time, or not at this time, that Stofella said that deed was no good?

A. Yes sir; it was after that conversation.

Q. Because Heyl didn't sign it?

Mr. BLENMAN:

Q. He said that on Monday night?

A. Yes sir.

Q. On the night of the 9th?

A. Yes sir.

L. W. ALEXANDER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

183 Direct examination by Mr. IVES:

Q. Mr. Alexander, will you please state whether you were present at this assembly at the store on the 4th of January, when Mrs. Heyl acknowledged a deed, and if so, what occurred?

A. Why, we made arrangements—Mr. Nugent was going out that

89

night—the attorney wanted to close this deal, because he would not probably be back in time to save its being sold at auction. There was no doubt in my mind that it would be sold at auction, and it was very humiliating to the people. Mr. Nugent, through my influence and the boys agreed to take it for what it was, to save the Sheriff's office—to save it from going under the hammer. He was to give them a two years' option, and more, if they wanted it, and make it out in favor of the children. They had several interviews and thought it would be safe for them. They wanted to get it done that night before Mr. Nugent left. They got Mr. Brown there to fix the papers, and Mrs. Heyl was satisfied. They had a meeting that night, and got Mr. Redondo there as notary. We came over, and there was Mr. Brown, Heyl, Redondo, Henry and Louie Levy, myself, and Mrs. Heyl. Mr. Heyl was there a part of the time. He seemed to have some objection to the option.

Q. Heyl was not satisfied with the option?

A. Yes sir. He said if they would change the option to read to Mrs. Heyl instead of the children, he would sign it—would
184 sign the deed; but if they would not do that he would not sign the deed. They discussed the matter, but he would not listen to any other way. Henry Levy says: If he won't sign it, it don't make any difference. So he put on his cap and went out.

Q. During the time Ben Heyl was there, where was the deed?

A. It was on the desk. Mr. Brown and Heyl stepped into the office; I was outside in the hall. I forgot whether the deed and option was placed in Heyl's hands, but he had a paper in his hands Heyl started to explain to me. He said that Nugent had agreed to let him have that shed back there until September the first, and when I brought the matter up, Nugent says: That is right. He said he was to have the house where he was living free from rent. He said it wasn't a matter of buying the property, but only six months because it could be redeemed. I told him it would give the boys a chance to get the property back. He agreed to that, if they would change the name in the option. Mr. Nugent didn't agree to that. He says: I can't change that, Heyl; I will leave it to the boys. Heyl says: If you won't change that I won't sign the deed. Mrs. Heyl was sitting at the desk there, and Redondo explained it thoroughly to her in Spanish.

Q. Do you understand Spanish?

A. Yes sir; well, a little.

Q. Did you understand enough to know in general what was said?

A. Yes sir. She was satisfied with it and signed it. The
185 option was read to her, and she was very much pleased with it.

Q. Now, after that, did you have any conversation with Stofella between that and the 9th of January?

A. Yes sir; I was up there on Saturday, the 7th.

Q. What—who was with you?

A. Mr. Brown and Louie Levy. I was going to start out, and Brown says: Maybe he won't take anything but a certified check or cash. We must get the cash here. If it's in town, we will get the

money. I went immediately to the depot and telegraphed to the Bank in Los Angeles.

Q. What bank?

A. The Farmers' and Merchants' National Bank in Los Angeles. I told them to rush and get it through. Anyhow they sent it. There was quite a bundle of money, and Saturday night we went down to receive it. I brought the money up and we stowed it here. In the morning I met Heyl, and he said: What have you got there? I said: That's the money to pay off these judgments. I said: That's the stuff that counts. I went out and got Brown and went up there. Brown says: Well, are you ready to go up — the Clerk's office and settle this business? Mr. Nugent has bought all this property and has a deed for it. He wants to get it in shape to put it on record, and he wants to settle it at once. Mr. Nugent has got the money to settle it. He says: Have you figured this up? Brown says: Yes.

186 Look at the figures. He says: I think that is a little short; I will go up and see what it is. He says: Has Nugent got the money to pay for this? Brown says: Certainly he has. He says: I will be up at one o'clock. I will come up and figure it over there in the Clerk's office. He figured it up in Molloy's office, and he objected to the figures because there was a difference of a couple of days—probably 14 or 15 days' difference, so we took his figures So I made out a check. The first check I made out was wrong. So I wrote out another and I said this is all right; we will take it up to Levy's and put it under the check protector.

Q. What do you mean by a protector?

A. A check perforator—a check protector. I asked if that amount was all satisfcatory. He took the check in his hand and looked at it, and he said: That is not a certified check. I said: Certainly not; it don't stand to reason that it is. I just made it out, but you can telephone and find out whether it is all right in a few minutes. He said: I want a certified check or the cash. I didn't have a certified check or the cash, but I went around all over town, and the best I could dig up was $8000 or $9000.00. Hodges had $12,000.00 in a certified check. I had about $2000.00 of payable warrants, and I said if you will take my check I will hand you the money Monday morning. Saturday night the money would be in. I went around and asked his bondsmen about it, and they didn't think it was right

187 for him to let me have the money, in his position. Well, I didn't get the money. When the money came in from Los Angeles, I put it away and held it until Monday morning. Sunday I showed it to Mr. Nugent. We wasn't sure that it was all right, so he counted it. We wrapped it up in a bundle, and I happened to see Stofella coming, so I picks up this bundle. I saw Baxter and Stofella walking into the Clerk's office. I went over there, and Stofella had a pen in his hand. I said: Here is your money to satisfy that judgment. Stofella said: I don't accept any money from you. I will accept money from Mr. and Mrs. Heyl. I said: Don't you want to settle this thing? I expect Heyl will be here at one o'clock. So at one o'clock we were here with the money but Stofella didn't show up. I knew right after he left that he was going to quit me.

Q. Now, when you came over in the morning to the Clerk's office and saw Stofella there and made the arrangement to meet him at one o'clock, what was Stofella doing?
A. He was making ready to sign papers in the Clerk's office.
Q. Releasing the judgments.
A. I don't know; I didn't read them.
Q. They were fixing papers?
A. Yes sir.
Q. You, at that time, had the money there?
A. I did, sir.
Q. And told Stofella that you had it?
A. Yes sir.

188 Cross-examination by Mr. BLENMAN:

Q. Who was present?
A. Molloy, and a young lady who was working for him at the time. She isn't here.
Q. You didn't have this deed signed by Mrs. Heyl to Mr. Nugent in your possession?
A. I had it to look at it.
Q. You never produced it to anybody? You never showed it to any one?
A. No sir.
Q. You were up to see Stofella on Saturday?
A. Yes sir.
Q. You didn't tell Stofella that the deed had been signed?
A. I didn't think it was necessary.
Q. Did you tell him?
A. No, I don't think I did.
Q. Don't you know that you didn't tell him?
—. No; I don't know it. We was in conversation and it was a pretty heated conversation.
Q. You say you offered the money in the presence of Mr. Molloy and Stofella?
A. I did not, I said: The money is here to satisfy the judgment.
Q. You never offered Stofella the money?
A. I laid the money out on the table.
Q. Whose table?
A. Molloy's. Stofella said he would only receive the
189 money from Mr. and Mrs. Heyl.
Q. Just as Stofella was signing some papers, you say?
A. Yes sir.
Q. Baxter was with him, you say?
A. Yes sir.

Mr. IVES:

Q. You said that Mr. Brown told Stofella that he, (Brown) had a deed: Did Brown say that to Stofella in your presence?
A. Yes sir.

Mr. BLENMEN:

Q. When?

A. On Saturday, the 7th of January.

Q. Now, do you recollect, Mr. Alexander, whether Mr. Brown said these words that Mr. Ives said; Mr. Ives said: Did you state to Stofella that Mr. Nugent had a deed to this property. Or, did Mr. Brown say that Mr. Nugent had bought all this property of Mrs. Heyl; or that Mrs. Heyl had sold the property?

A. Well, it was more to this effect: Nugent has bought the property; I have the deed signed by Mrs. Heyl in my pocket.

Q. Do you recollect that now?

A. It was words to that effect.

Q. Are you or are you not positive that Mr. Brown told him that he had a deed signed by Mrs. Heyl to Nugent?

A. Yes sir; I am positive.

Q. That he told him that on Saturday?

A. Yes sir.

190 JOHN STOFELLA, the defendant, having been previously duly sworn, recalled to the stand, testified as follows:

Direct examination by Mr. BLENMAN:

Q. On the morning of the 9th of January, when you were in the Clerk's room fixing up the papers to satisfy these judgments and Mr. Alexander came in, did Mr. Alexander tell you: I have the money now to pay you?

A. No sir; he never say nothing; he never mention money.

Q. But you were in Mr. Molloy's office at the time?

A. Yes sir.

THOMAS D. MOLLOY, Clerk of the Court, called as a witness on behalf of the defendant, being first duly sworn by the Court, testified as follows:

Direct examination by Mr. BLENMAN:

Q. Mr. Molloy, do you remember the morning of the 9th of January, when these judgments of Stofella against the Heyls were being satisfied, of being in your office, and Stofella being in there, engaged upon the satisfying of them? Do you recollect the occasion?

A. Yes sir.

Q. Do you remember of Mr. Alexander coming in?

A. Yes sir.

Q. Do you remember whether Mr. Alexander said anything to Mr. Stofella about his having money to satisfy these judgments.

191 A. Yes sir.

Q. What did Mr. Alexander say?

A. He *siad*: John, I have got your money here; Now, I want to close that matter up.

Q. What did Stofella say?

A. He said you had better send over for Mrs. Levy; I will talk to her about it; he said Mrs. Heyl.
Q. Was there any money there?
A. None that I saw.
Q. You never saw any money?
A. No.
Q. Was this statement of Mr. Alexander's made after Stofella had a deed from Mr. and Mrs. Heyl?
A. It was after the deed was of record in the Recorder's office.
Q. The deed to Stofella?
A. Yes sir.

Mr. Ives:

Q. Is it possible that the money might have been placed on some desk or table in your office without your having noticed it?
A. I might not have noticed it. If Mr. Alexander had any money it was on his person, and remained on his person.
Q. If the money were wrapped up in a bundle so that it did not indicate whether it was money or not, might it not have been there?
A. I think not; I didn't see anything in Mr. Alexander's
192 hands at all. If he had any money it was in his clothes and not in his hands.

Henry Levy, called as a witness in rebuttal, on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. What is your name?
A. Henry Levy.
Q. You are the son of Mrs. Heyl?
A. Yes sir.
Q. Mrs. Heyl who made this deed, in evidence here, to Mr. Nugent?
A. Yes sir.
Q. Did you have any conversation with Mr. Stofella on the subject of this transaction?
A. Yes sir.
Q. Between the 5th and the 9th of January?
A. Yes sir.
Q. When was it?
A. Why, the first time I went up to Stofella's, I believe, was on Friday.
Q. The 6th?
A. Yes sir.
Q. What was said there?
A. I went up there and told him that the money was ready
193 for him if he would come down to the office, to satisfy this mortgage. He said he would see about it. I came back home and nothing more was said about it on Friday. I went back again.
Q. What was the first day you went?
A. The first was on Friday. On Saturday I went again, and I

told him—I didn't go in the store; I met him at the front door, and I told him that Mr. Nugent had purchased all the property, and that if he would come down to Mr. Molloy's office everything would be settled. He said he would be down there at one o'clock. I came home and told Mr. Alexander about it. That is all I had to do with it.

Cross-examination by Mr. BLENMAN:

Q. You just simply said to him that Mr. Nugent had purchased the property?
A. Yes sir.
Q. You knew your mother had signed the deed?
A. Yes sir, I saw her sign it.
Q. You never told Stofella that?
A. No sir.
Q. When did you first know that your mother signed the deed?
A. When I saw her sign it in the store.
Q. Did you not offer yourself to sell the Main Street property? On behalf of your mother, of course?
A. No sir.
194 Q. You said nothing about it?
A. Nothing about the sale of the property; no sir.

JOHN STOFELLA, the defendant, having been previously duly sworn, recalled, and testified as follows:

Direct examination by Mr. BLENMAN:

Q. On Friday or Saturday, the 6th or 7th of January, did you have any conversation with the witness who has just left the stand, Henry Levy?
A. Yes sir.
—. Where was that converastion? At your store?
A. At my store. He made a couple of trips; he was up a couple of times at my store before that. He was up one day, and Mr. Heyl come up——
Q. Now, I want you to just keep close to the point. After the 4th day of January, what was the first conversation you had with Henry Levy?
A. He come up, and he say: Why you don't buy that property down in Main street. I tell him, I say: It is too much money for me. That was on Friday, about 9 o'clock. I say: You want too much for it; I tell him the same day—the same time, I say: You want too much for it. He says: You better buy the Main street property if you can raise the money; then you can raise your judgments. I say: I think the matter over; I think you want too much for it.
Q. Did he mention any price for the Main street property?
A. Yes sir; he wanted $10,500.00.
195 Q. Now, you have heard Mr. Brown's testimony, about him telling you, after the Nugent deed was signed that such

a deed had been signed by Mrs. Heyl. Did Mr. Brown tell you that or did he not.

A. I don't understand.

Q. I say, did Mr. Brown tell you, or did he not tell you, that Mrs. Heyl had signed a deed to Mr. Nugent for these two properties?

A. I never knew that Mrs. Heyl sign any deed to anybody. I know Mrs. Heyl she is want for that deed to be good.

Q. Did Mr. Brown tell you that?

A. He never did.

Q. What did Mr. Brown tell you?

A. He never mention any deed; he never talk about any deed.

Q. Did Mr. Brown ever make any remarks to you about anybody having bought that property?

A. No; he never did. I hear rumors around town that the property is sold, but I don't know who to. He never mention any money to me and he never talk about any deed.

Q. Did you ever have any notice of that deed before you obtained a deed to that property yourself?

A. I never did, until 8 o'clock on that night of the 9th of January; that is the first time I know it; Mr. Nugent he tell it to me himself; but he can't produce the deed, and I tell him: I don't believe you have a deed.

Q. Do you take the Yuma Sun?

196 A. I take a paper.

Q. How do you get the paper? By mail?

A. By mail; yes sir.

Q. Do you go to the post office every day?

A. Every day; sometimes the paper come in late a day or two. Sometimes I get the paper at 10, and sometimes at 12.

Q. Suppose the paper came out on the 6th?

A. Sometimes it is 3 or 4 days after that I get it.

Q. Now, you heard what Mr. Ives read out of that paper today? Do you recollect seeing that in the paper?

A. I never see that piece in the paper. If I see that I go to Mr. Nugent right away.

Q. Prior to the time you obtained your deed you had never seen that piece in the Yuma Sun?

A. No sir; today is the first time.

Q. Did you always read the paper carefully?

A. Yes sir; when I have the time.

Q. Do you read English well?

A. Oh, I read the paper all right.

Cross-examination by Mr. IVES:

Q. You just stated——

Mr. BLENMAN: Oh, excuse me, there is one question I wish to ask, about Mr. Alexander's evidence about that money. Did you see any package which might contain money, that day in Mr. Molloy's office?

197 A. I never see any money for anybody. That time before I get the deed from Mrs. Heyl, I was too glad if I can get

my money out of the property. If anybody offer me any money I be too glad to get it.

Q. Did you notice that time that Mr. Alexander had any package that might contain money?

A. I saw him here in front, but I don't see any package.

Q. He says he laid a package of money on Mr. Molloy's table; is that true or false?

A. I never see any money or any package.

Mr. IVES:

Q. You say that if you had seen that item in the newspaper you would have gone to Mr. Nugent to find out?

A. Yes sir.

Q. When you heard these rumors here, didn't you go to Mr. Nugent to find out?

A. No; because I don't know who buy the property.

Q. Why, you knew that Mr. Nugent and Mr. Alexander were very active in getting ready to pay these judgments?

A. Yes sir.

Q. Then, wouldn't you have known from the rumors that Mr. Nugent had bought it?

A. I thought Mr. Nugent got a mortgage on it.

Q. When you heard the rumors that the property had been sold wasn't the fact that Alexander and Nugent got the money to pay the mortgage sufficient to make you know that that referred to Nugent and Alexander?

198 A. I never know he got the deed; If I seen that piece in the paper, I come over to Nugent myself.

Q. Did anybody ever state to you that the deed was signed by Mrs. Heyl?

A. No sir.

Q. Or did anybody ever say to you that Nugent had purchased the property?

A. They never mention Nugent's name.

Q. I mean between the 5th and the 9th of January?

A. Well, I hear Mrs. Heyl sell the property, but I can't find who buy it.

Q. Did you ask anybody?

A. I don't remember.

Q. And you didn't find out to whom it was sold?

A. No; because Mrs. Heyl come up and tell me it is not so. And I don't find anything on the records about it.

Q. Whenever any one told you of any of these rumors, you never thought to ask who bought the property?

A. I didn't pay any attention to the rumor on the street. I can go by the records. I have to go by the record.

Mr. BLENMAN:

Q. You had a mortgage for sometime on this property, didn't you?

Mr. IVES: I object to that
Question withdrawn.

Mr. BLENMAN:

Q. You say there were common rumors on the street about
199 the sale of this property; for how long previously to this time had you heard these rumors?

A. I know the property was in real estate hands for sale: Mr. Pugh and Mrs. Pugh had it for sale in his office.

Q. Did anybody else have it for sale?

A. I don't know.

Q. You say for some months there were rumors every now and then that this property had been sold?

A. Yes sir. It was for sale.

Q. Do you know whether they had been trying to sell this property for a long time?

A. I don't know it until Mr. Heyl tell me.

Q. Did you know that they had been trying to sell it?

A. I know they did try, because the real estate man offered it to me.

Q. How long have you lived in Yuma?

A. About 14 years.

Q. Have you a fair knowledge of the value of real estate in the town?

A. Well, I got some.

Q. Have you a fair knowledge of the value of real estate in Yuma?

A. The value of real estate is this: Suppose I owned a piece of property for my own use, I can afford to pay a little more than somebody else, if I want it.

Q. Do you, or do you not know the value of the various pieces of real estate around Yuma?

200 A. A little.

Q. Can you testify as to what you consider the value of the Main stret property?

Objection. Objection sustained.

Q. What is the value of that property?

Objection. Objection sustained

Q. Do you know the value of the real estate around Yuma, or not?

A. Yes sir; I do; I buy real estate.

Q. Isn't it a fact that you have bought and sold lots of real estate around Yuma?

A. Yes sir.

Q. What is the value of that Main street property?

Mr. IVES: I object to the question; the witness has not shown that he is qualified to answer it.

Mr. BLENMAN:

Q. Do you know the value of the Main Street property?

A. Yes sir, I know the value.

Q. What is the value of that property?
A. What I paid for it I think is a pretty fair value; $10,500.00 that is what I paid for it.

F. M. RILEY, called as a witness in rebuttal, on behalf of
201 the defendant, being first duly sworn, testified, as follows:

Direct examination by Mr. BLENMAN:

Q. Your name please?
A. F. M. Riley.
Q. What is your business?
A. The real estate business.
Q. How long have you been in the real estate business?

MR. IVES: I will admit that he is qualified.

Mr. BLENMAN:

Q. Do you know this property referred to as the Main street property?
A. Yes sir.
Q. What do you consider a fair value for that property?
A. Well, I can't hardly say. It was listed to me by Mr. Heyl for $16,000.00. I finally bought it from Heyl for this man here for $10,000.00.
Q. What would you say was a fair value for this property as a real estate man?
A. It is owing to circumstances. I always considered it is worth just what you can get for it. If I had that I would want more than $10,000.00 for it. That was all that I could sell it for at that time. He was the only man who came to me. He wanted me to see if I could buy it for him and he wanted to buy it for that price.
Q. Do you consider that a fair value for that property, or did you consider it a fair value at that time?
202 A. Well, it is worth $10,000.00, and maybe more; anyhow it is worth $10,000.00.
Q. Maybe a little more?
A. Yes, more. I would think it would be worth a little more; between $10,000.00 and $12,000.00.
Q. $10,000.00 would be the minimum and $12,000.00 the maximum?
A. Yes sir. Yes sir; I think so.

All rest.

Stipulation.

It is hereby stipulated in open Court that the parties may present their findings and judgment to the Court, and that the Court may sign the same within any County in the First Judicial District of the Territory of Arizona, and that the findings and judgment may be sent to the Clerk at the County of Yuma, and that the judgment may be entered at any time in the absence of both the Court and the attorneys from the County of Yuma; and that each party shall

be admitted to have made such motion for a new trial as each party may see fit, and that such mution for a new trial be denied, and the denial thereto may be entered in the Court at Yuma, without the presence of either Court or counsel; and that either party may be deemed to have appealed to the Supreme Court of the Territory from such judgment entered, and denial of motion for a new trial.

203 In the District Court, First Judicial District, Territory of Arizona, in and for Yuma County.

No. 891.

M. J. NUGENT, Plaintiff,
vs.
JOHN STOFELLA, Defendant.

I, William F. Cooper, Official Reporter of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Yuma, do hereby certify that I was present in said Court at the trial of the above entitled cause on the 15th day of April, A. D., 1905; that I took down in shorthand all the questions propounded to the witnesses, and their answers thereto, during the trial of the said cause; that I have transcribed the same, and that the foregoing 118 pages of typewritten matter contain a full, true and correct transcript of all the questions propounded to the witnesses, and their answers thereto, as well also, the remarks, rulings, opinions and judgments given and rendered during the trial thereof by the Judge presiding at the trial.

Witness my hand, this 17th day of July, A. D., 1905.

WILLIAM F. COOPER,
Official Reporter of the District Court of the First Judicial District of the Territory of Arizona.

204 (Endorsed:) In the District Court, First Judicial District, Territory of Arizona, in and for Yuma County. M. J. Nugent, Plaintiff, vs. John Stofella, Defendant. No. 891. Before Hon. John H. Campbell, Judge of above entitled Court. Appearances: Messrs. Eugene S. Ives and C. L. Brown, for Plaintiff. Charles Blenman, Esq., for Defendant. Trial at Yuma, Arizona, April 15th, A. D., 1905. William F. Cooper, Reporter. Filed this 21st day of July A. D. 1905, at 0 minutes after 9 o'clock A. M. Thos. D. Molloy, Clerk. No. 917. In the Supreme Court, Territory of Arizona. M. J. Nugent vs. John Stofella. Reporter's Transcript. Filed July 28, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

BLURRED

205 In the Supreme Court, Territory of Arizona.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

Comes now the appellee and moves the Court to dismiss the appeal and affirm the judgment in this cause for the reasons:

1. There has been no bond on appeal ever given, filed and approved by the Clerk of the District Court, as required by law.

2. The so called appeal bond was not filed until more than 20 days after judgment and not within the time stipulated by the parties within which the same might be filed.

3. The judgment being one for the recovery of land the appeal bond is of no effect as failing to provide for payment of the rent or hire of the land.

Argument.

It is not intended to do otherwise than abide by the stipulation of the parties appearing at p-. 26 27 Abstract, but such stipulation must be strictly complied with.

The appeal bond although marked filed by the Clerk is not *approved* by him and is therefore not in compliance with par.
206 1506 R. S.

It also nowhere appears that the clerk fixed or was required to fix the probable amount of costs on appeal and hence the amount of the bond was not fixed and there is no bond in compliance with the Statute 1506.

The parties stipulated at the close of the trial and made it part of the record that 20 days after judgment should be the limit of time within which to perfect the appeal (p. 27 Abstract). The appellant ought to be compelled to abide by this stipulation as he gained other rights by it; but instead he delays perfecting his appeal until the last day before the time expires for him to comply with the condition of the judgment requiring payment of the money required to be paid as a condition of the judgment standing.

Respectfully submitted.

THOS. ARMSTRONG, JR.,
Attorney for Appellee.

(Endorsed:) No. 917. Supreme Court. M. J. Nugent vs. John Stoffela. Motion to Dismiss. Served on E. S. Ives Jan'y 8. Filed Jan'y 8, 1906. S. M. Cullom, Clerk. By Angie B. Parker, Deputy. Thos. Armstrong, Jr., Att'y for Appellee.

PAGES

207 In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

Memorandum in Opposition to Motion to Dismiss.

The case was submitted to the district court in Yuma about the 15th day of April. On or about the 15th day of May, the Judge in Tucson notified the respective attorneys what his decision would be. Findings were prepared, submitted, discussed, changed and finally signed somewhere near the end of June to the best recollection of counsel for the appellant. The findings and judgment were thereupon signed by the court and were dated May 15th, that being the date upon which the court had arrived at a determination of about what his judgment would be, and sent to the clerk for filing. The clerk marked the judgment filed the 15th of April, 1905. This is manifest error and was unquestionably done by the clerk because the case was submitted to the court at Yuma on that date.

The counsel for appellant is informed by the Judge that the term of court at Yuma was not adjourned until September. The bond was filed on the 3rd day of July, and the motion to dismiss was filed late in the afternoon of yesterday, the 8th, and was served
208 upon the attorney for the appellant the evening of the same day. The counsel for appellant cannot present these facts by affidavit in his absence from his office, nor can he obtain the certificate from the clerk of the Court at Yuma of the day upon which the term would adjourn without one or two days' delay.

The stipulation which appears in the Abstract of Record was unquestionably intended for the convenience of the court and of counsel for both parties, and its object was that neither party should waive anything by reason of the rendition of the judgment and the settlement of the findings at Tucson and not at Yuma, as required by law.

The provision with respect to the bonds providing for the payment of rent or hire of land applies to a supersedeas bond and has no application to an appeal bond.

The fact that the bond does not appear to have been marked "approved" by the clerk or that it does not appear that the probable costs will not exceed $200 is entirely immaterial. The appellant fulfilled his duty upon sending to the clerk a good and sufficient bond. It is not claimed that this bond is not good and sufficient and it is unquestionably in a sum greater than the costs can possibly amount to. If this be deemed material the appellant will present affidavits to the effect that the clerk did approve the bond.

The counsel for appellant filed his brief and the appellee
209 filed his reply brief. The time for the counsel for appellant to file his brief was extended by stipulation with the attorneys for the appellee. It is the distinct recollection of counsel for the appellant that the delay in preparing and settling findings, which

delay was for the mutual convenience of counsel, is an oral stipulation and was made in the presence of the Judge of the District Court to the effect that the stipulation made in open court at Yuma should be extended in its terms and that both parties should be protected.

It is believed that such oral stipulation extending the terms of the other stipulation is entirely unnecessary and that the appeal was properly perfected even if there had been no such oral stipulation. The fact, however, is submitted in connection with the written stipulation extending the time to file briefs as constituting a written stipulation covering the perfecting of the appeal. If the court should deem, after being satisfied that the term was not adjourned until September or two months after the bond was filed, that the foregoing facts are at all material to this motion, they will be presented by affidavit within two days upon leave by the court.

It is submitted, however, that the statute which gives the appellant twenty days until after the adjournment of the term to perfect his appeal cannot be abridged by any inference from a stipulation, although it might be extended by a stipulation.

Dated, Phœnix, Arizona, January 9, 1906.

EUG. S. IVES,
Counsel for Appellants.

210 (Endorsed:) No. 917. Supreme Court of Arizona. M. J. Nugent, Appellant, vs. John Stoffela, Appellee. Memorandum in Opposition to Motion to Dismiss. Original. Filed Jan'y 9, 1906. S. M. Cullen, Clerk. E. S. Ives, Att'y for appellant.

211 In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Appellant,
vs.
JOHN STOFELLA, Appellee.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Eugene S. Ives, being duly sworn, deposes and says: That he is one of the attorneys for the appellant; that on or about the 15th day of May at the city of Tucson the Judge of the District Court informed Charles Blenman, Esq., the attorney for the appellee, and deponent, about what his decision in the above action would be; that at said time the said Blenman and Ives were engaged in important matters in court which lasted until about the 26th day of June;

And deponent further says that to the best of his recollection at such time and in the presence of the Judge it was agreed between the said Blenman and deponent that the stipulation made in open court at Yuma with respect to the taking the proper steps to perfect an appeal should be extended to cover the proposed delay. That findings were prepared by both Blenman and deponent and submitted

to the judge, which said findings were changed by the judge
212 in several respects and were finally signed by the judge toward the end of June; deponent has no recollection of the date upon which the findings and judgment were signed, but avers that within the past hour deponent telephoned to the stenographer in his office at Tucson and was informed over the telephone by said stenographer that the records of deponent's office and the letter press copy of a letter written by deponent to C. L. Brown, one of the attorneys for the appellant, indicate that said findings and judgment were signed by the Judge on the first day of July, 1905, and upon such telephonic information deponent alleges that it is his belief that said findings and judgment were as a matter of fact signed by the judge on the first day of July, 1905; that the bond on appeal was filed with the clerk at Yuma on the 3rd day of July as appears by the endorsement thereupon now on file in this court.

Deponent is informed and believes that the term of the court at Yuma at which said judgment was rendered was not adjourned until the month of September, 1905, two months after the filing of the said bond on appeal; that the source of deponent's information is the Honorable John H. Campbell, Judge of the District Court, who so informed deponent this day and also Thomas Armstrong, Jr., Esq., attorney for appellee, who told deponent today that he knew that the term was not adjourned until September; that if required by the court deponent will obtain a certificate from the clerk from Yuma stating the precise day upon which the said term was adjourned.

213 Deponent did not file the bond in person but the same was filed, as deponent is informed, by C. L. Brown, Esq., one of the attorneys for appellant; that said Brown is now at Yuma and that if the court considers the fact material, deponent will obtain from the said C. L. Brown and from the clerk of the court at Yuma affidavits stating just what was said by the clerk to the said Brown and by the said Brown to the clerk with respect to the amount of the said bond as being more than the probable amount of costs, and with respect to the approval of the said bond by the clerk.

EUGENE S. IVES.

Subscribed and sworn to before me, this 9th day of January, 1906.

[SEAL.] O. E. SCHUPP,
Notary Public.

My Commission expires April 28, 1906.

(Endorsed:) No. 917. Supreme Court of Arizona. M. J. Nugent, Appellant, vs. John Stoffela, Appellee. Affidavit in opposition to Motion to Dismiss. Filed Jany. 9, 1906. S. M. Cullom, Clerk.

214 In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Plaintiff-Appellant,
vs.
JOHN STOFFELA, Defendant-Appellee.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Thomas D. Molloy, being first duly sworn, upon his oath says that he is Clerk of the District Court of the First Judicial District of the Territory of Arizona, in and for Yuma County, and was at all the times hereinafter named the duly appointed, qualified and acting Clerk of said District Court; that on July 3rd, A. D., 1905, he received, approved and filed the bond on appeal given by the above named plaintiff-appellant, M. J. Nugent, and that he, this affiant, on said 3rd day of July, A. D., 1905, made the following entry in the Register of Actions in his office, to-wit: "July 3, 1905, filed and approved bond on app.—60¢", in said cause, the same being case No. 891 in said District Court and now on appeal to the Supreme Court of Arizona Territory under the above title; that the sureties upon said bond, to-wit, Althee Modesti and L. W. Alexander, were, at the time of so filing and approving said bond, and are at this time, worth in unincumbered property situate in Yuma
215 County, Arizona, many thousands of dollars, fully competent in every sense to become such sureties, and would be qualified and acceptable upon a much larger bond than the said appeal bond in question; affiant further says that if his said approval of said bond is not indorsed thereon it was omitted through inadvertance or a clerical error, as said bond was in fact approved by affiant as such Clerk at the time the same was filed, to-wit: July 3rd, A. D., 1905.

THOMAS D. MOLLOY.

Subscribed and sworn to before me, this 10th day of January, 1906.

[SEAL.]

C. L. BROWN,
Notary Public.

(Endorsed:) No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent, vs. John Stoffela. Affidavit of Thos. D. Molloy. Filed Jany. 12, 1906. S. M. Cullom, Clerk.

216 In the Supreme Court of the Territory of Arizona.

No. —.

M. J. NUGENT, Plaintiff-Appellant,
vs.
JOHN STOFFELA, Defendant-Appellee.

Certificate of Fact.

I, Thomas D. Molloy, Clerk of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Yuma, do hereby certify that the Bond on Appeal in Cause No. 891, in said District Court, wherein M. J. Nugent was plaintiff, and John Stoffela was defendant, filed on July 3rd, 1905, was actually approved by me as such Clerk; and that the Register of Actions, Civil, of said District Court, contains the following entry, to-wit: "July 3, 1905, Filed & Approved Bond on App.—60¢". in said cause; that if said approval of said Bond is not endorsed thereon it has been omitted through a clerical error, as said Bond was in fact and in truth actually approved.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court this 10th day of January, A. D. 1906.

[SEAL.] THOS. D. MOLLOY,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

(Endorsed:) No. 917. In the Supreme Court of the Territory of Arizona. M. J. Nugent vs. John Stoffela. Certificate of Thos. D. Molloy, Clerk Dist. Court. Filed Jany. 12, 1906. S. M. Cullom, Clerk.

217 In the Supreme Court of the Territory of Arizona.

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFELLA, Appellee.

Appeal from the District Court of Yuma County, before Judge John H. Campbell.

Action by M. J. Nugent against John Stofella to quiet title to certain property, and praying that a certain deed and mortgage affecting the property be canceled. The defendant filed an answer and cross-complaint, asking that his title to the property be established. Judgment was entered establishing the title of the plaintiff to the property, and decreeing the defendant to be without title thereto, and decreeing that the deed and mortgage affecting the property be

canceled; all, however, upon the express condition that the plaintiff should pay to the defendant the sum of $15,100. From this judgment the plaintiff has appealed. Reversed.

Messrs. Eugene S. Ives and Charles L. Brown, for appellant.
Messrs. Charles Blenman and Thomas Armstrong, Jr., for appellee.

Opinion by Kent, C. J.

The plaintiff alone has appealed from the judgment. The
218 evidence in the case is not before us, the record presenting for our consideration the question, simply, whether the conclusions of law and the judgment entered thereon are supported by the findings.

The Court found as facts that on the 4th of January, 1905, and for a long time prior thereto, one Magdalena C. Heyl was the owner and in possession of the property in question, subject to certain judgment liens in favor of the defendant Stofella, on which there was due to him on January 4th, 1905, the sum of $15,700, with interest. That on said last mentioned day Heyl, for a valuable consideration, executed and delivered to the plaintiff Nugent a good and sufficient deed to the property; that prior to the execution of the deed to Nugent, Heyl, being indebted to Stofella, had executed and delivered to Stofella two mortgages upon the property, and that prior to January 4th, 1905, Stofella had instituted proceedings to foreclose such mortgages, and had obtained judgment against Heyl decreeing a sale of the property to satisfy such judgment, there being due to Stofella the said sum of $15,700; that in pursuance of such judgment the property was advertised for sale for the 10th of January; that on January 9th Heyl executed and delivered to Stofella, in consideration of the sum of $10,000, a deed to part of the premises, and on the same date executed and delivered to Stofella a mortgage upon the remaining portion of the premises to secure the sum of $5,700; that
219 this deed and mortgage to Stofella were recorded on January 9th, prior to the recording by Nugent of the deed given by Heyl to him; that Nugent, in consideration for the deed of January 4th, given him by Heyl, agreed with Heyl that he would procure the mortgages and judgment liens existing on January 4th in favor of Stofella and against Heyl to be paid and satisfied, and that Nugent, in compliance with such agreement with Heyl in good faith, made effort to pay the amount due, on said mortgages and judgment, to Stofella, and offered to pay the same with interest, and that Stofella, acting in bad faith and with intent to prevent the acquisition by Nugent of the title to the property, evaded the payment to him offered by Nugent, and procured the said deed and mortgage of January 9th to be executed by Heyl to himself; that on or about January 5th Stofella had full notice of the execution and delivery of the deed from Heyl to Nugent; that on the 9th of January Stofella voluntarily and of his motion, and not at the instance of Nugent or any one on his behalf, and not by mistake or inadvertence, but deliberately and in bad faith, with intent fraudulently to defeat the title of Nugent to the property under the deed from Heyl, and

to procure and effectuate in himself title to the property, satisfied of record the mortgage and the judgment liens existing in his favor, and that the sole and only consideration therefor was the deed and mortgage of January 9th, given to him by Heyl.

The Court found as conclusions of law, that the deed of January 4th from Heyl to Nugent conveyed to him a good title in fee simple to the premises; that the deed of January 9th from Heyl to
220 Stofella, purporting to convey a part of the premises, was void and of no effect; that the mortgage of January 9th from Heyl to Stofella, covering the remaining portion of the premises, was also void and of no effect; that "upon compliance with the conditions hereinafter imposed" Nugent was entitled to judgment against Stofella establishing his title to the premises; and that also upon compliance with said conditions, Nugent was entitled to judgment against Stofella canceling the deed and mortgage of January 9th from Heyl to Stofella. The condition imposed was thus stated by the Court:

"That it would be unconscionable and inequitable that the plaintiff should have judgment establishing his title and right to the possession of the said premises and canceling the said deed and mortgage without paying to the defendant the amount of the said judgment liens without interest, to-wit, the sum of $15,700. and that as a condition precedent to the enjoyment of the fruits of the said judgment, the plaintiff should pay within forty days from the date hereof the said sum of $15,700. to the defendant less the proper counsel fee of the plaintiff hereby fixed at the sum of $600. and the costs of this action."

Judgment was accordingly entered in favor of Nugent, subject to the conditions stated. From this judgment Nugent alone has appealed.

The action brought, being one to quiet title, was one in equity. Such an action has not lost its equitable character by reason of the fact that we have a statute defining and enlarging the original action in equity.

Costello v. Muheim, — Arizona. —; — Pac. —.

It was within the province of the trial Court, therefore, in
221 such action to impose such terms upon the plaintiff, as a condition precedent to his recovery, as might be just and proper.

Upon the facts as found by the trial Court, to which no exception has been taken by Stofella, we do not think the Court was justified in imposing the payment referred to, as a condition precedent. The Court found that Nugent in good faith endeavored to pay to Stofella the existing mortgage and judgment; that Stofella in bad faith evaded such payment, and that with full knowledge of the facts deliberately and in bad faith, and with intent fraudulently to defeat the title of Nugent, Stofella satisfied of record the mortgage and judgment. Under such a state of facts, we do not think that Stofella was entitled to the payment decreed as a condition precedent to the relief sought by the plaintiff. A court of equity will not protect a wrongdoer from the result of his own

wrongful and fraudulent acts, or grant him relief where, having entered upon a fraudulent scheme to deprive another of his rights, he fares badly in his adventure and is prevented from consummating his scheme, merely because he finds himself out of pocket the amount of money he has expended in furtherance of his scheme, and because the person whom he sought to wrong may profit pecuniarily to the extent of such outlay. A right can not be predicated from acts founded in fraud.

Henry v. Mayer, 53 Pac. (Ariz.) 590.

Nor is this case similar to one where a person seeks to have a conveyance made to or by him set aside because of fraud
222 on the part of the other person engaged in the transaction. There a court of equity will apply the maxim that he who seeks equity must do equity, and will frequently decree that the party against whom relief is sought shall first be placed in the position he occupied before the transaction complained of. The court proceeds on the theory that as the transaction ought never to have taken place, the parties are to be restored, if possible, to their original situation.

Neblett v. MacFarland, 92 U. S. 101.

But here the fraud was not fraud that arose out of a transaction between the parties. It arose out of an independent transaction on the part of Stofella to secure to himself the property. Nugent is not asking to have a transaction between himself and Stofella rescinded, but simply to have his title established. The debt from Heyl to Stofella was an independent debt, not connected with the comparative validity of the titles of Nugent and Stofella. To decree that Nugent should pay such debt as a condition precedent to the establishment of his title, would not restore any state of affairs that had formerly existed between the parties. It would restore Stofella to a position perhaps even better than the one he was in before he entered upon his independent fraudulent scheme. The principle that requires the plaintiff to "do equity" does not warrant the imposing of arbitrary conditions.

Pomeroy's Eq. Juris., par. 386.

223 Under the facts as found by the court, we do not think the case was one for the application of the maxim referred to. "So far as any general rule on the subject can be laid down, it may with assurance be stated, that a plaintiff who shows himself otherwise entitled to the aid of a court of equity will not be denied relief unless the defendant brings forward some corresponding equity growing out of the subject matter then in suit which would at some time subsequent to the transaction in some form of the proceeding entitle him to a remedy against the other party with respect to the subject matter involved."

Otis v. Gregory, 111 Ind. 504.

Stofella, having voluntarily canceled his mortgages and judgment liens, now asks to be relieved of the consequences of that act. Had he done so through ignorance, under a mistake of fact, or in the

furtherance of an honest purpose, he might, in a proper case, be heard to urge the relief he asks. But the court found that the cancellation was made, not under mistake or in the furtherance of any honest purpose, but dishonestly, in the furtherance of a fraudulent purpose. He will not be heard in a court of equity, upon a failure of his fraudulent scheme, to claim the same relief from his wilful fraudulent act that might properly be granted to one in good faith.

As said by the Supreme Court of the United States in the case of Neblett v. MacFarland, *supra:*

"Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."

224 To quote from the language of the court in the case of Guckenheimer v. Angevine, 81 N. Y. 394:

"The law cares very little what a fraudulent party's loss may be, and exacts nothing for his sake. (Beardsley J. Mason v. Bovet, 1 Den., 74.) It certainly will not undertake to indemnify him for the expenditures made in the prosecution of his fraudulent purpose."

And from the case of Davis v. Leopold, 87 N. Y., 620:

"If it was true under the findings that Mrs. Leopold was entitled to protection for the sum paid or the liability assumed, it would indeed be necessary to state the precise amount, but she was a guilty participant in the fraud, and not to be cared for. The transaction itself is to be nullified (Citing authorities). These cases follow and illustrate the rule laid down by Chancellor Kent at a very early date in Boyd v. Dunlay (1 Johns. Ch. 478), that a deed fraudulent in fact is absolutely void and is not permitted to stand as security for any purpose of reimbursement or indemnity."

The following cases are illustrative:

R. R. Co. v. Soulter, 13 Wall, 517;
Lynch v. Burt, 132 Fed., 417;
Burt v. Gotzain, 102 Fed., 937;
Sands v. Codwise, 4 Johns, 536, 598.

The judgment of the District Court in so far as it imposes conditions precedent to the relief granted to the plaintiff, is reversed, and the case is remanded to the District Court with directions to that Court to enter judgment absolute for the plaintiff.

EDWARD KENT, *C. J.*

We concur:

RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*
FREDERICK S. NAVE, *A. J.*

(Endorsed:) No. 917. In the Supreme Court, Territory of Arizona. M. J. Nugent, Appellant, vs. John Stofella, Appellee. Opinion. Kent, C. J. Recorded Book 6, Pages 407-412. Filed Mar. 30, 1906. S. M. Cullom, Clerk.

225 In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Appellant,
vs.
JOHN STOFELLA, Appellee.

Comes now the appellee in the above entitled cause, and moves the court to grant a rehearing of said cause, and as a reason for the granting thereof, shows that the so called finding of fact, made by the court below, finding the appellee, Stofella, guilty of fraud, is in fact a conclusion of law and is not based upon any sufficient facts found by the court, and that without such finding of fact, the said finding is without basis, and not sufficient to warrant this court in finding as it does, that the appellee was guilty of any actual fraud which should deprive him of his property and give the same to the appellant who has failed to fulfill his agreement made at the time he obtained title to the property in question, as shown by the findings.

Dated at Phoenix, April 5, 1906.

THOS. ARMSTRONG, JR.,
Attorney for Appellee.

(Endorsed:) No. 917. In the Supreme Court, Territory of Arizona. M. J. Nugent, Appellant, vs. John Stofella, Appellee. Motion for Rehearing. Filed April 13, 1906. S. M. Cullom, Clerk. Served by mail on att'y for appellant Ap'l 12/06. Thos. Armstrong, Jr.

226 In the Supreme Court of the Territory of Arizona.

JOHN STOFFELA, Appellant,
vs.
M. J. NUGENT, Appellee.

Appeal Bond.

Know all men by These Presents: That we, John Stoffela, as principal, and John Gandolfo and E. G. Caruthers, as sureties, are held and firmly bound unto M. J. Nugent, the Appellee herein, in the penal sum of one thousand ($1,000.) dollars, to be paid to the said M. J. Nugent Appellee and Respondent, his heirs, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13 day of January 1908.

The conditions of the above obligation are such that, if the abovenamed appellant, John Stofella, shall prosecute his appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona rendered in the above entitled matter with effect, and if he fail to make his plea good shall

answer and pay all costs, then this obligation to be void;
227 otherwise to remain in full force and effect.

JOHN STOFFELA. [SEAL.]
JOHN GANDOLFO. [SEAL.]
E. G. CARUTHERS. [SEAL.]

TERRITORY OF ARIZONA,
County of Yuma, ss:

John Gandolfo and E. G. Caruthers being first duly sworn, on their oaths depose and say; each for himself and not one for the other, that he is a resident and freeholder within the County of Yuma and Territory of Arizona; that he is worth the sum of one thousand ($1,000.) dollars in property within the Territory of Arizona over and above his debts, liabilities, and property exempt from execution.

JOHN GANDOLFO.
E. G. CARUTHERS.

Subscribed and sworn to before me this 13 day of January, 1908.

[SEAL.] CHARLES H. UTTING,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

TERRITORY OF ARIZONA,
County of Yuma, ss:

Before me, Charles H. Utting, Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma, on this day personally appeared John Stoffela and John Gandolfo and
228 E. G. Caruthers, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 13 day of January, 1908.

[SEAL.] CHARLES H. UTTING,
Clerk of the District Court, First Judicial District, Territory of Arizona, County of Yuma.

(Endorsed:) No. 917. In the Supreme Court of the Territory of Arizona. John Stoffela, Appellant, vs. M. J. Nugent, Appellee. Bond on Appeal to the Supreme Court of the United States. Approved as to form and sufficiency this 6th day of March, 1908. Edward Kent, Chief Justice. Filed March 6, 1908. F. A. Tritle, Jr., Clerk.

229 In the Supreme Court of the United States of America.

JOHN STOFFELA, Appellant,
vs.
M. J. NUGENT, Appellee.

Assignment of Error.

Comes now the appellant, John Stofella, in connection with his appeal, and as a part thereof makes the following assignment of error, and avers that it occurred upon the trial of said cause, to-wit:

I.

The Supreme Court of the Territory of Arizona erred in so modifying the judgment of the Court below as to strike therefrom the condition on which the said judgment was made.

II.

The Supreme Court of the Territory of Arizona erred in directing the modification of the judgment of the Court below so as to give the appellant in that Court and the appellee here, M. J. Nugent, complete title free from incumbrances to the property involved in the action.

III.

The Supreme Court of the Territory of Arizona erred in directing the modification of the judgment of the Court below so as to give M. J. Nugent, the appellant in said Court and the appellee
230 here, title to property for which he paid no consideration and at the same time relieving him from the payment of incumbrances thereon running to John Stoffela, the appellee therein and the appellant here.

IV.

The Supreme Court of the Territory of Arizona erred in so modifying the judgment of the Court below as to destroy and cancel all of the security of the appellant herein on the property involved, and to give the same to the appellee herein free from the appellant's lien without payment of any part of the debt equitably due and owing to the appellant herein.

V.

The Supreme Court of the Territory of Arizona erred in so modifying the Decree of the Court below as to absolve the appellee herein from all obligation to do equity as a condition of receiving equity.

Wherefore: The said John Stoffela prays that the order of the Supreme Court of the Territory of Arizona made on the 30th day of March, 1906, in the said cause, reversing the judgment of the District Court in so far as it imposes conditions precedent to the relief

granted and remanding the case to the District Court with directions to render judgment absolute for the appellee herein, M. J. Nugent, be reversed.

JOHN J. HAWKINS AND
THOS. ARMSTRONG, JR.,
Attorneys for the Appellant.

(Endorsed:) No. 917. In the Supreme Court of the United States of America. John Stoffela, Appellant, vs. M. J. Nugent, Appellee. Assignment of Error. Filed March 14, 1908. F. A. Tritle, Jr., Clerk.

231 In the Supreme Court of the Territory of Arizona.

Be it remembered, that heretofore and on to-wit, the 8th day of January, A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 917.

M. J. NUGENT, Appellant,
VS.
JOHN STOFFELA, Appellee.

It is ordered that the Motion to Dismiss Appeal, filed herein by Appellee, be and the same is hereby, submitted.

And afterwards and upon to-wit the 9th day of January, A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 917.

M. J. NUGENT, Appellant,
VS.
JOHN STOFFELA, Appellee.

On motion of Mr. Engene S. Ives, attorney for Appellant
232 herein, It is ordered that oral argument be granted in this cause.

On motion of Thos. Armstrong Jr., It is ordered that his name be entered of record as attorney for Appellee herein, and

On motion of Mr. Thos. Armstrong Jr., attorney for Appellee herein, It is further ordered that this cause be set for oral argument January 15th, 1905.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

By consent of attorneys for Appellant and Appellee herein, It is ordered that this cause be re-set for January 16th, 1906.

And afterwards and upon to-wit the 10th day of January A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

233 No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

In this cause it is ordered that Appellant herein have until the 13th instant in which to file certificate or other showing of approval of Appeal Bond herein.

And afterwards and upon to-wit the 15th day of January A. D., 1906, the same being one of the regular juridical days of the January Term, A. D., 1906, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

The Motion to Dismiss Appeal, filed herein by Appellee, having been heretofore submitted, and by the Court taken under consideration, and the Court having considered the same and being fully advised in the premises, It is ordered that said Motion be and the same is hereby, denied.

And afterwards and upon to-wit the 16th day of January A. D., 1906, the same being one of the regular juridical days of the

January Term, A. D., 1906, of said Court, the following
234 order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

This cause coming on for hearing was argued by Mr. E. S. Ives for Appellant, and Mr. Thos. Armstrong, Jr., for Appellee, and cause ordered submitted.

And afterwards and upon to-wit the 30th day of March A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order and judgment, inter alia, was had and entered of record in said Court in said cause, which said order and judgment is in words and figures, as follows, to-wit:

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

This cause having been heretofore submitted, and by the Court taken under consideration and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court in so
235 far as it imposes conditions precedent to the relief granted to the plaintiff, be and the same is hereby, reversed, and the case remanded to the District Court with directions to that Court to enter judgment absolute for the plaintiff.

It is further ordered, adjudged and decreed that the Appellant herein, do have and recover of and from John Stoffela Appellee herein, his costs in this court taxed at eighty-one and 5/100 ($81.05) Dollars, and his costs in the court below in this cause incurred.

And afterwards and upon to-wit the 12th day of May A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

It is ordered that the Motion for Re-hearing filed herein by Appellee, be submitted.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

236 No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

It is ordered that the Motion for Re-hearing filed herein by Appellee, and heretofore submitted, be and the same is hereby, denied.

And afterwards and upon to-wit the 15th day of November, A. D., 1907, the same being one of the regular juridical days of the January Term A. D., 1907, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 917.

M. J. NUGENT, Appellant,
vs.
JOHN STOFFELA, Appellee.

At this day comes Mr. Thos. Armstrong, Jr., attorney for Appellee herein, in open court and gives notice of appeal to the Supreme Court of the United States from the judgment of this Court.

237 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 236, inclusive, are a true and complete transcript of the record and proceedings had in said Court, in case No. 917, M. J. Nugent, Appellant, against John Stoffela, Appellee, as the same remain on file and of record in my office.

I further certify that the attached Citation is the original Citation issued by the said Supreme Court of the Territory of Arizona in said above entitled cause.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona, this 9th day of June, 1908.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.

238 In the Supreme Court of the Territory of Arizona.

JOHN STOFFELA, Appellant,
vs.
M. J. NUGENT, Appellee.

It appearing that the Clerk of the above Court is unable to have the record ready for filing and said cause docketed in the Supreme Court of the United States by the return day,

It is ordered that the time of the above named appellant to file the record in the above cause, and to docket the above cause in the Supreme Court of the United States, be and the same is hereby extended until June 30, 1908.

EDWARD KENT,
Chief Justice.

239 In the Supreme Court of the United States of America.

JOHN STOFFELA, Appellant,
vs.
M. J. NUGENT, Appellee.

Citation.

UNITED STATES OF AMERICA, *ss:*

To M. J. Nugent and E. S. Ives, Esq., his attorney:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington in the District of Columbia, within sixty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the Supreme Court of the Territory of Arizona, wherein the said John Stoffela is appellant and M. J. Nugent is appellee, to show cause, if any there be, why the judgment in said appeal mentioned, to-wit the judgment of the Supreme Court of the Territory of Arizona dated and rendered March 30, 1906, in a certain cause wherein the said M. J. Nugent was appellant and the said John Stoffela was appellee, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of March, in the year one thousand nine hundred and eight.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

240 OFFICE OF THE SHERIFF,
County of Pima, ss:

I hereby certify that I received the within Citation on the 10th day of March, A. D. 1908, and personally served the same at the hour of 11 A. M. on the 11th day of March, A. D. 1908, on the

within named E. S. Ives, Esq., being the defendant's attorney named in said Citation, by delivering to E. S. Ives, Esq., in the City of Tucson, and County of Pima, a copy of the within Citation.

Dated this 11th day of March, A. D. 1908.

NABOR PACHECO,
Sheriff of Pima County,
By H. MEYER, *Deputy.*

241 [Endorsed:] Original. No. 917. In the Supreme Court of the United States of America. John Stoffela, Appellant, vs. M. J. Nugent, Appellee. Citation. Filed March 14, 1908. F. A. Tritle, Jr., Clerk. Armstrong & Lewis, Lawyers, Nat'l Bank of Arizona B'l'd'g, Phœnix, Arizona.

Endorsed on cover: File No. 21,230. Arizona Territory Supreme Court. Term No. 179. John Stoffela, Appellant, vs. M. J. Nugent. Filed June 15th, 1908. File No. 21,230.

FILED.
MAR 1 1910
JAMES H. McKENN

BRIEF FOR THE APPELLANT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 179.

JOHN STOFFELA, APPELLANT,

vs.

MARY NUGENT, Executrix of the Will of M. J. Nugent, Deceased, Substituted for M. J. Nugent, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

JOHN J. HAWKINS,
Attorney for the Defendant and Appellant.

THOS. ARMSTRONG, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 179.

JOHN STOFFELA, APPELLANT,

vs.

MARY NUGENT, Executrix of the Will of M. J. Nugent, Deceased, Substituted for M. J. Nugent, APPELLEE.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the Territory of Arizona reversing the judgment of the District Court of Yuma County, so far as the judgment of such District Court imposes conditions precedent to the relief granted to the plaintiff.

This action was commenced on the 9th day of January, 1905, in the District Court of Yuma County, Arizona, by M. J. Nugent, as plaintiff, against John Stoffela as defendant. The action was one brought to quiet title to certain lots of land in the Village of Yuma, Yuma County, Arizona, it being alleged in the complaint (Folio 1, Transcript of the Record) that on the 4th day of January, 1905, and for a long time prior thereto, one Magdalena C. Heyl was the owner and in possession of the said real estate, to-wit: Lot 1 in Block 21, and Lot 4 in Block 15, in the Town of Yuma; that

on said day, for a valuable consideration to her paid by the plaintiff, M. J. Nugent, she by a deed in writing sold and conveyed to the said Nugent all of the said real estate; and that the said Nugent thereupon became the owner thereof and entitled to the possession thereof.

That thereafter, and on the 9th day of January, 1905, the defendant (appellant herein), John Stoffela, well knowing that the said Nugent had purchased all of said property and was the owner thereof and entitled to the possession thereof, made a pretended purchase of part of said property, to-wit: Lot 4 in Block 15, from the said Magdalena C. Heyl and Ben C. Heyl, her husband; and induced them to deliver to him their deed in writing of the same, the which deed was caused to be filed for record in the office of the County Recorder of Yuma County on the 9th day of January, 1905.

That on the same day, to-wit, the 9th day of January, 1905, the defendant, Stoffela, well knowing that the plaintiff, Nugent, had purchased all of said property and was the owner thereof and entitled to the possession thereof, induced the said Magdalena C. Heyl and Ben C. Heyl to execute and deliver to him a mortgage upon part of said property, to-wit, Lot 1 in Block 21, in the sum of $5,700; and on the same day caused said mortgage to be filed for record in the office of the County Recorder of said Yuma County.

That said deed and mortgage so made by said Magdalena C. Heyl and Ben C. Heyl and filed for record as aforesaid is a cloud upon the title of plaintiff's property aforesaid, and made without right or shadow of right whatever; and that the defendant, Stoffela, well knew when he caused said deed and mortgage to be executed and delivered to him that the said Heyl had no title or color of title to said property, or any part thereof; and that any money or valuable thing that the defendant, Stoffela, may have paid to the said Magda-

lena C. Heyl and Ben C. Heyl, or either of them, for the said deed and mortgage, was paid with full knowledge that they nor either of them had any right to receive money or valuable thing from the defendant therefor, or make said deed and mortgage.

WHEREFORE, the defendant prayed judgment:

1. That the title of the plaintiff to the said lots in fee simple be established and the right of the plaintiff to the possession thereof.

2. That said deed and mortgage be cancelled and declared to be of no effect whatever; and that said defendant, John Stoffela, or anyone claiming under him, has no right, title, claim or interest in the said property or any part thereof; and that the defendant be forever barred and estopped from having or claiming any right or title in the said premises adverse to the plaintiff.

The defendant, Stoffela, filed his answer (Fol. 35, Trans.), wherein he admitted that on January 4, 1905, and for a long time prior thereto, Magdalena C. Heyl was the owner and in possession of the property described in the plaintiff's complaint, and denied that for any valuable consideration Magdalena C. Heyl had conveyed the same to the plaintiff; and denied that the plaintiff was the owner or entitled to the possession of said property.

Further answering, the defendant alleged that the deed set forth in the plaintiff's complaint, executed by Magdalena C. Heyl to the plaintiff, Nugent, was executed without any consideration; and further alleged that he, the said defendant, Stoffela, believing the said Magdalena C. Heyl to be the owner of said property, on the 9th day of January, 1905, agreed with her for the purchase of said Lot 4 in Block 15

of the Town of Yuma for the price of $10,000; and also agreed with her that the amount of the said purchase price should be credited to her against the amount then due from her to this defendant, Stoffela, upon a mortgage which the defendant alleged the said land was then subject to, and upon which there was due from the said Magdalena C. Heyl to this defendant the sum of $15,700; and that the balance due on said mortgage, which was then settled between her and the defendant at the sum of $5,700, should be secured to be paid by a mortgage from her to the defendant on Lot 1 in Block 21 of the said Town of Yuma; and that immediately on the said deed and mortgage being delivered, he, the defendant, would satisfy and discharge the said former mortgages upon the property securing the said sum of $15,700.

That in pursuance of such agreement the said Magdalena C. Heyl and her husband executed and delivered to the defendant on the 9th day of January, 1905, a deed to said Lot 4 in Block 15, and also a mortgage to secure the sum of $5,700 on said Lot 1 in Block 21 of the said Town of Yuma; and in pursuance of such agreement, and immediately upon said deed and mortgage being executed and delivered, the defendant, Stoffela, discharged and satisfied his former mortgages under which there was then due to him the sum of $15,700; and the defendant thereupon, on said 9th day of January, 1905, caused the said deed and the said mortgage to be recorded in the office of the County Recorder of said Yuma County; and that the sum of $10,000, being the consideration mentioned in said deed, was actually paid by this defendant to the said Magdalena C. Heyl under the circumstances above set forth at the time and on the date of said deed.

And that this defendant had not at or before the making of the said deed any notice whatever, either expressed or implied, of the making of the deed under which the plaintiff,

Nugent, claimed title; nor was the plaintiff's said deed then on record.

Further answering, the defendant denied that the plaintiff had any title to the real property mentioned in the complaint, or any part thereof; and further alleged that any money or valuable thing that he may have paid for his said deed was paid with knowledge that the said Heyls had no right to receive the same; and further alleged that they, the said Heyls, had no right to make the said deed to the plaintiff.

By way of cross-complaint, the defendant further alleged (Fol. 41, Trans.) that the deed under which the plaintiff claimed was made without consideration, and was therefore void; that said deed was not recorded in the office of the County Recorder of Yuma County until after the deed and mortgage executed by the said Heyls to this defendant were respectively recorded in such office; that the plaintiff's deed was a cloud upon this defendant's title to the said Lot 4 in Block 15 of the Town of Yuma, and also a cloud to his title as mortgagee of the said Lot 1 in said Block 21 of the Town of Yuma.

WHEREFORE, the defendant demanded judgment against the plaintiff as follows:

1. That said deed under which the plaintiff claims be cancelled.

2. That the said plaintiff, or anyone claiming under him, has no right, claim, interest or demand to or upon the whole of said real property, or any part thereof.

3. For such other and further relief as may be just and equitable, and for all proper orders.

4. And for costs of suit herein incurred.

To this answer and cross-complaint, the plaintiff filed a general demurrer and denial. (Fols. 43-44, Trans.)

The case was tried by the Court without a jury, and findings of fact and conclusions of law were made and filed by the District Court, wherein it was found:

I.

That on the 4th day of January, 1905, and for a long time prior thereto, Magdalena C. Heyl was the owner and in possession of the property described in the plaintiff's complaint, and that the same was subject to judgment claims thereon in favor of the defendant, John Stoffela, on which there was due to him on the said 4th day of January, 1905, the sum of $15,700 and interest. (Fol. 46, Trans.)

II.

That on the 4th day of January, 1905, the said Magdalena C. Heyl for a valuable consideration executed and delivered to the plaintiff, M. J. Nugent, by good and sufficient deed in writing all of the aforesaid real property.

III.

That prior to the execution of the said deed to the said Nugent, the said Magdalena C. Heyl was indebted to the defendant, and had executed and delivered to the defendant two mortgages upon the said property. That prior to the said 4th day of January, 1905, the defendant had instituted a suit of foreclosure against the said Magdalena C. Heyl, and judgment had been entered therein in favor of the defendant, Stoffela, and against the said Magdalena C. Heyl, and de-

creeing that said premises be sold at public auction, and the proceeds applied to the satisfaction of the said judgment, and that there was due to the defendant as aforesaid the said sum of $15,700 and interest.

IV.

That the said premises in pursuance of said judgment were duly advertised for sale by the sheriff of the County of Yuma, said sale to take place in the Town of Yuma on the 10th day of January, 1905.

V.

That on the 9th day of January, 1905, the said Magdalena C. Heyl executed and delivered to the said defendant, for and in consideration of the sum of $10,000, a certain deed in writing, purporting to convey to the said defendant the said Lot 4, Block 15; and on the same date the said Magdalena C. Heyl executed and delivered to the said defendant a mortgage upon the said Lot 1, Block 21, to secure the sum of $5,700.

VI.

That the said deed and mortgage executed by the said Heyl to the said Stoffela were recorded in the office of the Recorder of the County of Yuma on the 9th day of January, 1905; that the said deed from the said Heyl to the said Nugent was recorded in the office of the Recorder of the County of Yuma subsequent to the recording of the said deed and mortgage from the said Heyl to the defendant.

VII.

That the said plaintiff, in consideration of the said deed executed and delivered to him by the said Magdalena C. Heyl, agreed with the said Magdalena C. Heyl that he would procure the said mortgages and judgment liens in favor of

the said defendant and against the said Magdalena C. Heyl to be paid and satisfied; and that the said plaintiff, in compliance with the said agreement with the said Magdalena C. Heyl, in good faith made effort to pay the amount due upon the said mortgage and judgment to the said Stoffela, with interest, and offered to pay the same with interest; and that the said Stoffela, acting in bad faith with intent to prevent the acquisition by the said Nugent of title to the said property, evaded the payment to him by the said Nugent of the amount of the said judgment liens, and procured the aforesaid deed and mortgage to be executed by the said Heyl to himself.

VIII.

That on or about the 5th day of January, 1905, the said defendant had full, complete and adequate notice of the execution and delivery of the said deed from Heyl to the plaintiff.

IX.

That on the 9th day of January, 1905, the defendant voluntarily and of his own notion, and not at the instance of the plaintiff or of anyone acting in his behalf, and not by mistake or inadvertance, but deliberately and in bad faith with intent fraudulently to defeat the title of the said Nugent in and to the said property under the said deed from the said Heyl, and to procure and effectuate in himself, title to the said property, did satisfy of record the said mortgage and the said judgment liens, and the sole and only consideration made or paid to him therefor was said deeds and mortgages executed to him by said Heyl.

CONCLUSIONS OF LAW.

I

The deed executed on the 4th day of January, 1905, by the said Magdalena C. Heyl to the plaintiff conveyed a good and sufficient title in fee simple to the premises, to-wit: Lot 1, Block 21, and Lot 4 in Block 15, all in the Town of Yuma, County of Yuma, Territory of Arizona, according to White's official survey of said Town of Yuma.

II.

The deed executed by the said Heyl to the defendant on the 9th day of January, 1905, purporting to convey Lot 4 in Block 15 to said defendant, conveyed no title whatever, and is null, void and of no effect.

III.

That the mortgage executed by the said Heyl to the defendant, purporting to convey the said Lot 1 in Block 21 as security for the sum of $5,700, did not convey any title whatever, or create any lien or encumbrance whatever upon the said Lot 1 in Block 21, and the said mortgage is void and of no effect and force whatever.

IV.

That upon compliance with the conditions hereinafter imposed the plaintiff is entitled to judgment against the defendant establishing the title of the plaintiff in fee simple, and the right of the plaintiff to the possession of said Lots 4 in Block 15 and 1 in Block 21, and barring and forever estopping the defendant from having or claiming any right or title to the said lots adverse to the plaintiff.

V.

That the said deed and mortgage executed by the said Heyl and delivered to the defendant, and recorded in the office of the Recorder of the County of Yuma, are a cloud upon the title of plaintiff to the two lots in question.

VI.

That upon compliance with said conditions the plaintiff is entitled to judgment against the defendant that the said deed and mortgage executed by the said Heyl to the defendant, and recorded in the office of the Recorder of the County of Yuma, be cancelled and declared to be of no effect whatever.

VII.

That it would be unconscionable and inequitable that the plaintiff should have judgment establishing his title and right to the possession of the said premises and cancelling the said deed and mortgage without paying to the defendant the amount of the said judgment liens without interest, to-wit, the sum of $15,700, and that as a condition precedent to the enjoyment of the fruits of the said judgment the plaintiff should pay within fifty days from the date hereof the said sum of $15,700 to the defendant, less the proper counsel fee of the plaintiff, hereby fixed at the sum of $600, and the costs of this action.

Judgment following these findings of fact and conclusions of law was accordingly given in the District Court of Yuma, whereby it was ordered, adjudged and decreed that the title of the plaintiff, Nugent, in fee simple and his right to the possession of the lands in question was established, and the defendant and all persons claiming under him were barred and forever estopped from having or claiming any right or title thereto adverse to the plaintiff.

That the deed executed by Magdalena C. Heyl and Ben Heyl, her husband, to the defendant, John Stoffela, bearing date of the 9th of January, 1905, and recorded the same day, and a certain mortgage executed by the said Heyls to the said Stoffela to secure the payment of the sum of $5,700, being the mortgage described in the findings, was cancelled and declared of no effect whatever.

The judgment further recites that it is made upon the express condition that on or before the 4th day of July, 1905, the plaintiff pay or cause to be paid to the defendant the sum of $15,700, less the sum of $600, together with $2.85, his costs in this action; and in case the plaintiff should fail to pay to the defendant said sum on or before said date, then this judgment shall be void and of no effect whatever. (Fols. 52-53, Trans.)

From this judgment an appeal was taken by the plaintiff, Nugent, to the Supreme Court of the Territory of Arizona, the appellant limiting his appeal to that portion of the judgment and decree which requires that the plaintiff shall pay to the defendant on or before July 4, 1905, the sum of $15,700, less $600 and costs, and in event of the said plaintiff's refusal to pay said sum of money, that said judgment and decree shall be null and void; and the plaintiff also appealed from the order denying his motion for a new trial of said action. (Fol. 93, Trans.)

The cause was tried in the Supreme Court of Arizona, and the judgment of the District Court of Yuma was reversed in so far as it imposed conditions precedent to the relief granted to the plaintiff. (Fol. 224, Trans.), the entire opinion of the Court appearing at pages 106-7-8-9-10 of the Transcript; and it is from this judgment of the Supreme Court of Arizona so modifying said decree of the District Court of Yuma that this appeal is taken to this Court, and the following errors are

assigned upon which a reversal of said judgment of the Supreme Court of Arizona, and an affirmance of the judgment of the District Court of Yuma, is now asked.

ASSIGNMENTS OF ERROR.

Comes now the appellant, John Stoffela, in connection with his appeal, and as a part thereof makes the following assignments of error, and avers that they occurred upon the trial of said cause, to-wit:

I.

The Supreme Court of the Territory of Arizona erred in so modifying the judgment of the Court below as to strike therefrom the condition on which the said judgment was made.

I.

The Supreme Court of the Territory of Arizona erred in directing the modification of the judgment of the Court below so as to give the appellant in that Court and the appellee here, M. J. Nugent, complete title free from incumbrances to the property involved in the action.

III.

The Supreme Court of the Territory of Arizona erred in directing the modification of the judgment of the Court below so as to give M. J. Nugent, the appellant in said Court, and the appellee here, title to property for which he paid no consideration, and at the same time relieving him from the payment of incumbrances thereon running to John Stoffela, the appellee therein, and the appellant here.

IV.

The Supreme Court of the Territory of Arizona erred in so modifying the judgment of the Court below as to destroy and cancel all of the security of the appellant herein on the property involved, and to give the same to the appellee herein free from the appellant's lien without payment of any part of the debt equitably due and owing to the appellant herein.

V.

The Supreme Court of the Territory of Arizona erred in so modifying the decree of the Court below as to absolve the appellee herein from all obligation to do equity as a condition of receiving equity.

WHEREFORE, the said John Stoffela prays that the order of the Supreme Court of the Territory of Arizona made on the 30th day of March, 1906, in the said cause, reversing the judgment of the District Court in so far as it imposes conditions precedent to the relief granted and remanding the case to the District Court with directions to render judgment absolute for the appellee herein, M. J. Nugent, be reversed.

JOHN J. HAWKINS and
THOS. ARMSTRONG, JR.,
Attorneys for the Appellant.

(Fols. 229-30, Trans.)

The appellant particularly specifies that the decree of the Supreme Court of Arizona is erroneous in striking out of the judgment of the lower Court the conditions upon which the said judgment was rendered, and giving to Nugent, the plaintiff, in the lower Court, complete title to the premises in question free from any obligation to perform the conditions made for the benefit of the defendant, upon which he ob-

tained his title, and thereby depriving the defendant, Stoffela, of all means to collect his judgment liens thereon, which liens the plaintiff, Nugent, had assumed and agreed to pay as the consideration for the transfer of the property to him. It is somewhat difficult to further particularly specify the errors relied upon, and they can be much more clearly shown if considered all together and as all being covered by the first assignment of error and amplified by those that follow.

ARGUMENT.

This was an action brought to quiet the title of the plaintiff to certain lands and premises, to cancel the deed and mortgage held thereon by the defendant, and to have it adjudged that the defendant had no claim or interest in the premises, and to bar, foreclose and estop the defendant from having or claiming any right or title to the premises adverse to the plaintiff.

The answer of the defendant alleges that the plaintiff obtained his conveyance without the actual payment of any consideration; that the defendant being the owner of two mortgages against the property in question long antedating the plaintiff's deed, upon which there was due at the time the plaintiff took his deed from the grantors of the plaintiff to this defendant, the sum of $15,700; that the defendant took a conveyance of part of the land for $10,000 and a mortgage for $5,700 on the balance that was to satisfy his prior mortgages, which he afterwards did without any other consideration being paid. By his cross-complaint, the defendant prays for cancellation of the plaintiff's conveyance and for judgment that the plaintiff has no right, title or interest in the property, and also for "such other and further relief as may be just and equitable." (Fol. 41, Trans.)

This is, therefore, strictly an equitable proceeding, and although statutory in form, has not lost its equitable character, and, in fact, was so held by the Supreme Court of Arizona in this very case. (Fol. 220, Trans.)

The District Court on the trial of this cause found as facts that on the 4th day of January, 1905, and for a long time prior thereto, Magdalena C. Heyl was the owner and in possession of the premises in controversy in this suit, and that the same were subject to judgment liens in favor of the defendant, John Stoffela, and that there was due him thereon on the 4th day of January, 1905, the sum of $15,700 (Fol. 46, Trans.); that prior to the 4th day of January, 1905, the defendant instituted a suit for foreclosure of mortgages against the said Magdalena C. Heyl, and judgment had been entered therein in favor of the said Stoffela against the said Magdalena C. Heyl, foreclosing the said mortgages; and that the premises in question were advertised for sale by the Sheriff of Yuma County, said sale to take place on the 10th day of January, 1905; and on the 4th day of January, 1905, Mrs. Heyl, for a valuable consideration, as the Court found, executed and delivered to the plaintiff, M. J. Nugent, a good and sufficient deed in writing. The Court does not find or state what that consideration was, otherwise than as stated in Finding No. VII, wherein the Court says that the plaintiff in consideration of the said deed executed and delivered to him by the said Magdalena C. Heyl, agreed with the said Magdalena C. Heyl that he, the plaintiff, would procure said mortgages and judgment liens in favor of the said defendant, Stoffela, against the said Magdalena C. Heyl, to be paid and satisfied. There is nowhere in the fiendings of fact any other or further consideration found, and, in fact, that was the only consideration ever passing between the plaintiff, Nugent, and Mrs. Heyl for the delivery of her deed to him; and it was upon this deed that the plaintiff based his title in this action, and he never claimed nor had any other title to the

premises in question; nor is it claimed that the plaintiff ever performed the conditions upon which he was to have the title to said premises, and under which he received the said deed; and the District Court in confirming the plaintiff's title to the premises and quieting it as against the claims of the defendant made it an express condition that the plaintiff should perform the conditions upon which he received the title, and pay the amount of judgment liens which he had assumed and agreed to pay to the defendant, Stoffela. The language of the Court below in its final conclusion of law upon which its judgment was based is so strong, clear and convincing that almost no other argument after the statement of facts as found by the Court is considered as needed.

In the seventh conclusion of law, at Folio 50 of the Transcript, the District Court says "that it would be unconscionable and inequitable that the plaintiff should have judgment establishing his title and right of the possession of said premises and cancelling the said deed and mortgage (meaning the deed and mortgage of the defendant, Stoffela) without paying to the defendant the amount of said judgment liens, without interest, to-wit, the sum of $15,700; and that as a condition precedent to the enjoyment of the fruits of said judgment, the plaintiff should pay within fifty days of the date hereof the said sum of $15,700 to the defendant, less the proper counsel fees of the defendant hereby fixed at the sum of $600 and the costs of this action."

The Court below also found, and it should be borne in mind that these findings are not disturbed by the judgment of the Supreme Court of Arizona, but are those upon which it based its decree, that on the 9th day of January, 1905, being five days after the execution of the deed of Magdalena C. Heyl to the plaintiff, Nugent, the said Magdalena C. Heyl executed and delivered to the defendant, Stoffela, a deed to one of these lots for a consideration of $10,000, and a mortgage upon the other lot to secure the sum of $5,700; and that

this deed and mortgage were recorded prior to the recording of the deed made by her on the 4th of January, 1905, to the plaintiff, Nugent, the consideration for this deed and mortgage being in the exact amount which was then due the defendant, Stoffela, from the said Magdalena C. Heyl on his judgment liens obtained by foreclosure of his mortgages upon said property and no consideration actually passed from Mrs. Heyl to the defendant at the time of the making of the said deed and new mortgage except Stoffela's promise to satisfy his judgment liens.

The District Court found that on the 5th day of January, 1905, the defendant, Stoffela, had full, complete and adequate knowledge of the execution and delivery of the deed from Mrs. Heyl to the plaintiff, Nugent, and that thereafter the defendant, Stoffela, of his own notion satisfied of record his former mortgages and the judgment liens resulting from foreclosure thereof, and that no other consideration was ever made to him for such satisfaction than the deed and mortgage executed to him by Mrs. Heyl on the 9th of January. (Fol. 48, Trans.)

As conclusions of law, the Court found that the deed and mortgage executed by Mrs. Heyl to the defendant, Stoffela, were void and of no effect, for the reason, as we may assume, that they were executed and delivered after the making and execution of the deed of January 4th to the plaintiff, Nugent; and this deed and mortgage to Stoffela were by the judgment of the Court following these findings cancelled and declared to be of no effect, while the deed of January 4th to Nugent was declared to be good and valid, and Nugent's title under the same established; but in view of the fact that Nugent's deed and title so established were received by him from Mrs. Heyl upon his agreement and for the consideration that he, Nugent, would pay off and discharge the liens on the property held by Stoffela under his mortgage fore-

closure, and then amounting to $15,700, the Court made its judgment conditioned that Nugent should perform the conditions under which he had acquired the title; that is, by paying to Stoffela the amount of his liens, to-wit, $15,700, less a $600 attorney fee allowed to Nugent in the case. It is this condition that the Supreme Court of Arizona struck from the judgment, and so allowed Nugent to secure title to the lands in question without the payment of a cent, and absolved him from the performance of his agreement under which he took the title, and which he expected to perform when he took it. By the same stroke the Court took away from Stoffela, without any compensation whatsoever, all means of obtaining payment of the liens which he had formerly had upon the property, and which he had perhaps foolishly and prematurely satisfied.

That such a judgment should shock the conscience and appear inequitable and unjust to a court of equity the Court below had expressly concluded; but our Supreme Court bases its rendition of such judgment upon the ground that Stoffela was also guilty of a fraud in having satisfied his own judgment liens and thereby by some means attempted to complete his title under his new deed and mortgage to the detriment of the plaintiff, Nugent's, title.

The Supreme Court of Arizona seems to lose sight entirely of the relative situation of the parties in pronouncing a judgment which results in giving to the plaintiff the fruits of his refusal to perform the conditions on which he obtained his title, and to entirely deprive the defendant of all right to obtain payment of money justly due him upon his judgment liens upon the same property, and the payment of which the plaintiff assumed. It must not be forgotten that the plaintiff is the moving party seeking relief in this case, and that he must do equity in order to obtain equity. It will not do to say, as that Court seems admittedly to have done, that be-

cause each party is seeking to obtain a wrongful advantage over the other that one shall reap the fruits of his wrongdoing, but the other not only be deprived of it, but be stripped of all his right and property, which in this case amounts to about $16,000, and that the same be awarded to the other.

The plaintiff was seeking relief. He was absolutely bound to do equity to entitle him to equity. He made no tender or offer to do in court the thing the Court found he was required to do to make good his title, both as a matter of equity and in fulfillment of the promise on which he obtained the title. Nevertheless, he is awarded full relief, and the defendant refused even the right to have restored or paid to him the judgment liens he had upon the property the plaintiff obtains, and which liens the plaintiff had agreed to pay to him as the consideration for the title he obtained.

If the parties were each engaged in wrongful acts to supplant or deprive the other of what was equitable, the rule is too firmly established to be shaken that the duty of the Court was to leave them as it found them, and award no advantage or relief to either. On the other hand, if equity is done to one, and especially the moving party, it must be done to the other; and this is exactly what the District Court did by its judgment, and what the Supreme Court undid by its decree.

It is true that the finding of the District Court is that Nugent, in compliance with his agreement with Mrs. Heyl, in good faith made effort to pay Stoffela the amount due upon his mortgage and judgment, and that Stoffela in bad faith evaded the payment with intent to prevent the acquisition by Nugent of title to the property; and the Supreme Court (Fol. 221, Trans.) bases its decree entirely on this finding. It is difficult to understand by what process of reasoning it could have been found as a fact by the lower Court that the satis-

faction by Stoffela of a judgment lien in his own favor was a fraud upon Nugent, the purchaser of the property, and we respectfully submit that this is not a finding of fact, but is merely a conclusion of the lower Court, and not entitled to any weight, unless based upon some fact found to support it, and there is entire lack of such in the findings. Stoffela did satisfy his judgment, but it was after Nugent had taken his deed and agreed to pay that judgment; and by no course of reasoning can it be demonstrated that this worked any fraud on Nugent. On the other hand, it put him in a position of having no excuse for refusing to pay the judgment, and it was his duty to tender the amount thereof in court, if he could not otherwise reach Stoffela to make tender. This he did not do, but the District Court required him to do it as a condition of quieting his title; and we are here now seeking to be restored to the benefit of this condition, of which the Supreme Court of Arizona deprived us by its decree.

The Supreme Court of Arizona also in its opinion attempts to base its decree upon the ground that the fraud in question arose out of an independent transaction entered into by Stoffela to secure to himself the property, and that the debt due from Heyl to Stoffela was an independent debt, not connected with the title of Nugent, and the decree that Nugent should pay the debt as a condition precedent to the establishment of his title would not restore any state of affairs that had formerly existed between the parties. This line of reasoning is so fallacious upon its face that a review of the facts found is all that is necessary to refute it. Nugent took his title January 4th. He then agreed with his grantor, Mrs. Heyl, to pay off Stoffela's mortgage judgment liens against the same property, and this was the sole and only consideration upon which he assumed title. Stoffela's judgment was then in full force and effect. Nugent assumed and agreed to pay it, and he bound himself to do so as completely as though the condition had been inserted in writing in the deed. It became his obli-

gation to Stoffela, and upon it Stoffela could have obtained a judgment against him, just as the grantee of land assuming and agreeing in the deed conveying the land to him to pay a mortgage thereon becomes primarily liable for the debt. It was, therefore, from that moment Nugent's obligation to Stoffela and not an independent debt between Heyl and Stoffela as formerly.

Johns vs. Wilson, 180 U. S. 440.

The debt was intimately connected with the title of Nugent, and the payment of it was the condition upon which he held the title. He never has paid it. He may not have been able to make direct payment to Stoffela because, as the Court found, Stoffela evaded payment, but this does not relieve the plaintiff from tendering payment in court, or making payment as required by the District Court as a condition to the quieting of his title. Though Stoffela did satisfy his judgment on the record, he received no consideration therefor other than the deed and mortgage which the lower Court held void as having been given to him after the deed to Nugent.

If, therefore, the Court act at all upon the case before it, it must act in accordance with the rules of equity. It is moved by the complainant or plaintiff, Nugent, to quiet his title as against all claims of the defendant, Stoffela. The plaintiff must, therefore, come into court with clean hands, and offering or being required to do equity as a condition of the relief he seeks. He must in this case perform the condition on which he would hold the title which he claims, or the Court must deny him any relief whatever. There is no inequity in restoring the parties to the condition they were in when Nugent took his deed, and to restore them to this condition the Court should simply require the plaintiff to pay the mortgage liens to Stoffela as he agreed to do, and as the District Court required.

"The fundamental theory upon which equity acts is that of restoring the defrauding party primarily, and the fraudulent party, as a necessary incident, to the positions which they occupied before the fraud was committed. Assuming that the transaction ought not to have taken place, the Court proceeds as though it had not taken place, and returns the parties to that situation. Even in such cases the Court applies the maxim, 'he who seeks equity must do equity,' and will thus secure to the wrongdoer in awarding its relief whatever is justly and equitably his due."

2 Pom., Sec. 910.

"'In order to obtain relief, the complainant must restore the other party to the condition in which he stood before the transaction. This requirement is based upon the maxim that he who seeks equity must do equity. In cases of fraud, if the defendant's act has prevented a complete restoration of the status quo, he cannot, in justice, urge this fact as a defense to the rescission; but in other cases, such as mistake, it would seem reasonable that the status quo should be completely restored as a condition of equitable relief."

6 Pom., Sec. 688.

"As a condition of obtaining relief, complainant must as a general rule restore defendant as far as possible to the position which he occupied before the transaction which is sought to be rescinded. The remedy of cancellation, like other forms of equitable relief, is subject to the maxim, 'he who seeks equity must do equity.' If by the act of the fraudulent party complete restoration is made impossible, 'if he has so entangled himself in the meshes of his own knavish plot that the defrauded party cannot enloose him,' the equitable remedy will not thereby be defeated; but if cancellation is sought on other grounds than that of fraud, a change of the defend-

ant's situation which prevents a restoration of the status quo as to him will also prevent the complainant's success."

6 Cyc. 306 et seq.

A court of equity simply refuses its aid as a court of conscience to add to the fortune of a party who has in a moral point of view succeeded too well in the particular transaction, and the relief sought will be denied, unless the contract be fair, just and reasonable, and founded upon adequate consideration.

Dunlap vs. Kelsey, 5 Cal. 181.

In a case very similar to the one at bar, it has been held that the plaintiff who has obtained a conveyance upon an agreement to pay a mortgage debt, and has not done so, is in no position to have his title quieted, and a judgment quieting it in the lower Court was reversed.

Littlejohn vs. Miller, 31 Pac. Rep. 758-759.

Our contention, therefore, is that the plaintiff not having performed the condition upon which he took his deed, and not now offering to perform it, is not in a position to obtain any relief, and upon the whole case the judgment of the District Court should be affirmed.

The District Court had complete power to render the judgment which was entered under the pleadings and findings of fact in this case. There was a prayer for general relief both by the plaintiff and by the defendant, and under such a prayer any relief may be granted which is appropriate to the facts alleged and proved, whether asked for in the petition or not.

Beven vs. Powell, 83 Mo. 365.

Equitable decrees may be adapted to any requirement of a case. There is no limit to their variety or application as called for by the varying circumstances of each particular case.

Robinson vs. Clark, 76 Me. 493.

Adverse equities growing out of, or closely connected with the subject matter of a suit, are protected by awarding the party the relief to which he is entitled only on condition that he awards to his adversary the corresponding right to which he is entitled.

Lynch vs. Burt, 132 Fed. 417.

Where the defense is insufficient to justify decreeing a deed void as having been fraudulently obtained, and yet it was obtained under such circumstances as to render it at least unfair for the defendant to retain the full advantage of his bargain, the Court may direct that the deed shall stand only as security for the defendant's indemnity in respect of a sum actually due.

Dunn vs. Chambers, 4 Barb. 376.

Where a case for relief is made out by the bill, it may be given by imposing conditions on the plaintiff, consistently with the rules of equity in the discretion of the Court.

Waldon vs. Rodley, 39 U. S. 156.

Before one should in good conscience be permitted to reap what he has not sown, or profit by the misfortune, mistake or undoing of another, or enjoy the fruits of dishonesty or sharp practice, it should be perfectly plain that he be himself free from any intentional wrongdoing.

Henry vs. Mayer, 53 Pac. Rep. 590 (Ariz.).

The last cited case is one which the Supreme Court of Arizona has quoted from in its decree in this cause, and we respectfully submit that if the equitable rules laid down in that case by the same Court had been followed in this case, the judgment of the District Court would have been confirmed, and the decree so framed that the plaintiff in this case would not have had confirmed to him a title for which he had paid nothing, and for which he had refused to pay the very consideration which the District Court had required him to pay.

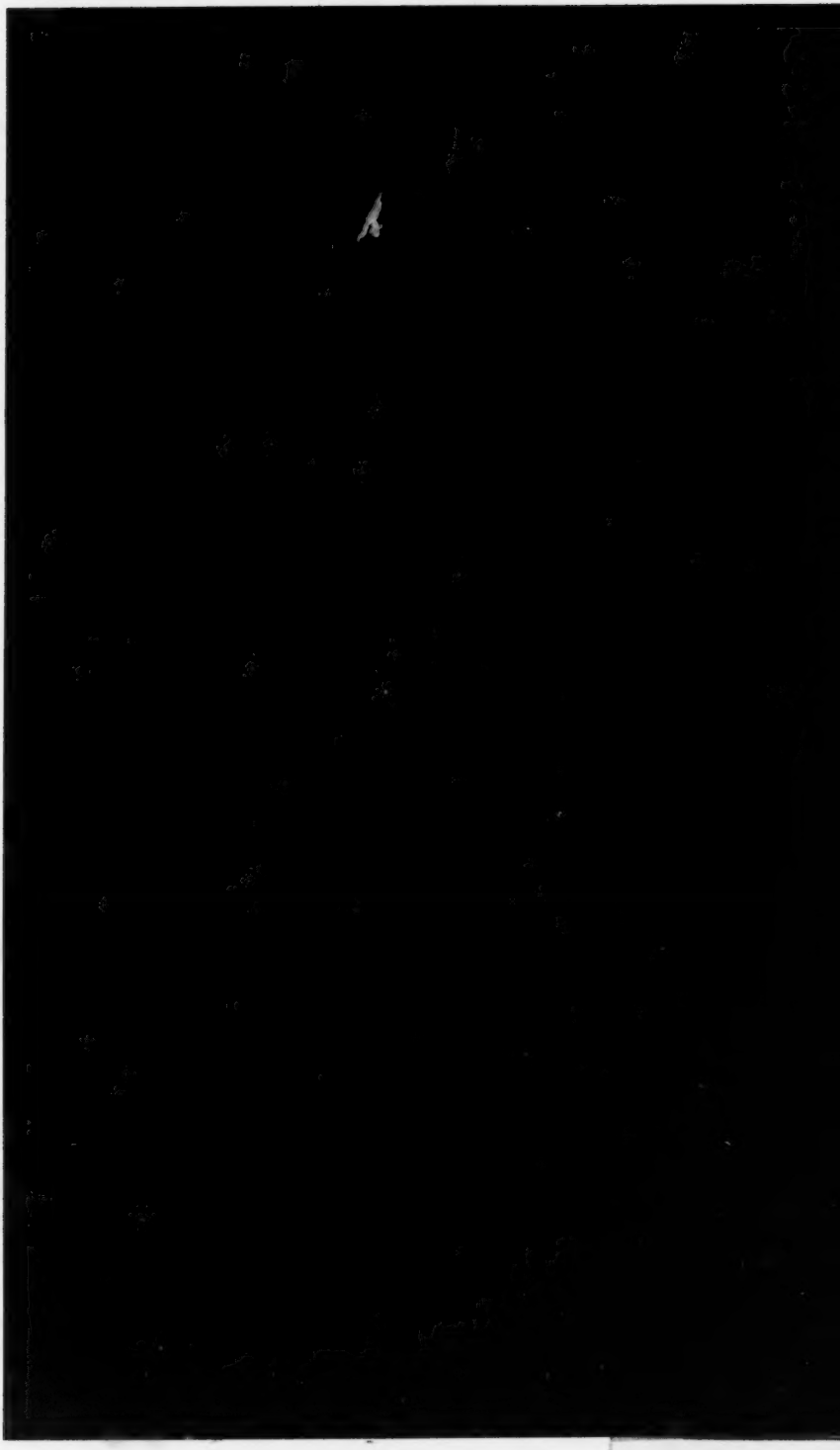
We therefore respectfully submit that the decree of the Supreme Court of Arizona, so far as it strikes from the judgment of the District Court the conditions upon which such judgment was rendered, should be reversed, and the decision of the District Court be affirmed.

JOHN J. HAWKINS,
Attorney for the Defendant and Appellant.

THOS. ARMSTRONG, JR.,
Of Counsel.

APPELLANTS

BRIEF



BLURRED PA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 179.

JOHN STOFFELA,
Appellant,

vs.

MARY NUGENT, EXECUTRIX,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT.

The facts of this case are as follows:

In January, 1905, the appellant was mortgagee of lot 1, in block 21, and lot 4, in block 15, in the town of Yuma, Arizona, to secure an indebtedness of $15,700.00, the lots in question being the property, subject to the mortgage, of one Magdalena C. Heyl, wife of Ben C. Heyl. Foreclosure proceedings had been instituted, and the foreclosure sale was set for January 10th of that year. On January 4th,

Mrs. Heyl conveyed the property to M. J. Nugent, appellee's testator, the only consideration for the conveyance being Nugent's undertaking to pay the mortgage, and to give Mrs. Heyl's children by a former marriage, of whom all but one were infants, an option to repurchase the property within two years for the amount of the mortgage (Rec., pp. 28, 59-60, 61). On January 9th, five days later, she conveyed lot 4, in consideration of a credit of ten thousand dollars on the mortgage, to the appellant, the latter accepting from her a mortgage on lot 1 for the remaining fifty-seven hundred dollars, payable in three years after that date. The deed and mortgage to appellant were recorded at 11 o'clock A. M., on January 9th, while the deed to appellee's testator, though executed five days earlier, was not recorded until 2.30 P. M. of that day. The only disputed fact in the case, apparently, was whether appellant had notice of the conveyance to Nugent prior to taking the conveyances of January 9th to himself. The trial was before the Justice holding the District Court of the First Judicial District of the Territory of Arizona, sitting without a jury, who found the issue of fact in favor of Nugent, and, by the judgment set out at pages 25-6 of the Record, decreed that Nugent's title should be established and the conveyances to appellant cancelled and held of no effect, upon condition that Nugent should pay to appellant $15,700, the amount of his mortgage, less an allowance to Nugent of $600 as a counsel fee and the costs of the action. The concluding finding of law by the trial Justice (Record, p. 25) was as follows:

> "That it would be unconscionable and inequitable that the plaintiff should have judgment establishing his title and right to the possession of the said premises, and cancelling the said deed and mortgage, without paying to the defendant the amount of the said judgment liens, without interest, to wit, the sum of fifteen thousand seven hundred dollars, and that, as a condition

BLURRED PAG

precedent to the enjoyment of the fruits of the said judgment, the plaintiff should pay within fifty days from the date hereof the sum of fifteen thousand seven hundred dollars to the defendant, less the proper counsel fee of the plaintiff, hereby fixed at the sum of six hundred dollars, and the costs of this action."

This judgment was rendered on the 15th day of May, 1905. From so much of it as required him to pay to the appellant the amount of the mortgage, which, as stated, was the sole consideration to be paid by him for the property under his agreement with Mrs. Heyl, his grantor, Nugent, appealed (Rec., pp. 34-5) to the Supreme Court of the Territory of Arizona, which reversed that portion of the decree appealed from and directed the entry of a judgment absolutely for Nugent, which action of the Court gives him the property without paying anything therefor to Mrs. Heyl, to the appellant, or to any one whomsoever. The case is here on appeal from this decree of the Supreme Court of the Territory.

The testimony before the trial Court is set out in the record, at pages 42-9, and was conflicting. The appellant testified that Nugent's attorney and representatives offered him an uncertified check on or about January 5th, which he declined to take, which was the only tender ever made him, and that on January 8th Mr. Heyl asked him to purchase lot 4, which after some negotiations he agreed to do for the sum of ten thousand dollars, with an allowance of five hundred dollars for commissions, with which Heyl said he was chargeable, appellant taking the fifty-seven-hundred-dollar-mortgage on lot one for the residue of the indebtedness; that he had heard rumors about sales of the property, but not to Nugent; that he inquired of both Mr. and Mrs. Heyl, who informed him no sale had been made; that he examined the records and, finding no deed recorded, believed there was none and closed the transaction accordingly. Mrs.

Heyl, testifying through the medium of an interpreter, said (Rec., p. 60) that she did not know she was doing wrong; that she did not tell appellant she had signed the deed to Nugent "because he did not ask me, and I could not say so;" that she did not tell her husband she had signed the deed to Nugent (Rec., p. 61); that appellant told her that her husband had said that he had not signed the deed, and put no questions to her as to whether she had made any deed about the property (Rec., pp. 62-3).

Mr. Heyl, the husband, corroborated appellant as to the negotiation which led to the conveyances to the latter (Rec., pp. 62-3-4), and testified that his wife did not tell him she had already signed the deed; that he had heard she did, but looked the matter up, found it not of record, and paid no more attention to it (Rec., p. 64); that appellant asked witness whether she had signed it, and was told that to the best of the husband's knowledge and belief she had not (Rec., p. 64). The husband was dissatisfied with that feature of the Nugent transaction which restricted to the children the right to repurchase, he insisting that Mrs. Heyl, herself, should have the option, which Nugent or his attorney refused, and informed him that his signature would not be necessary to the deed (Rec., pp. 67-8).

On the other hand, Nugent, his attorney Mr. Brown, and the adult son of Mrs. Heyl testified that, on the evening of January 9th the appellant admitted he knew of the Nugent deed, but claimed it was invalid because not signed by Heyl, and not recorded. Brown (Rec., p. 78) and Levy (Rec., p. 89) testified that, on January 9th, appellant admitted Brown had told him on January 5th of the Nugent deed, while Nugent, who was present at the same interview, (Rec., p. 86), testified that, at it, appellant had said that he "did not remember of Brown saying that." Brown testifies (Rec., p. 75) that the refusal to accede to Mr. Heyl's request that the option should be given to Mrs. Heyl, in-

BLURRED

stead of to her children, all but one of whom were minors, was because Mrs. Heyl said she wished it to run to the children; while Nugent (Rec., p. 84) testifies that it was he, himself, who refused to make the change.

It is, of course, not expected that this Court will review the findings of fact upon the present record. It is submitted, however, that, as to the facts, the testimony is by no means so clear and conclusive as to justify the Court, if it were a matter of discretion, simply, not only in deciding the issue of fact against the appellant upon the question whether his deed or that of Nugent should be established, but in going further, and, in effect, penalizing the former, for Nugent's benefit, in the full amount of his indisputably valid mortgage, and in decreeing the land to Nugent free and discharged of the payment of the mortgage, his agreement to pay which, as above pointed out, was the sole consideration for the conveyance of the land to him by Mrs. Heyl.

The value of the land, according to the testimony for Nugent, was, at the very least, $32,000, and perhaps as much as $40,000 (Rec., pp. 78-9). The decree appealed from, as stated, gives him this property without the payment of a dollar for it, to anyone.

THE ASSIGNMENTS OF ERROR.

The assignments of error, five in number, set out at pages 13-14 of the Record, may be reduced to a single proposition, namely:

It was error upon the part of the Supreme Court of Arizona to strike from the decree of the lower Court the requirement that, as the condition of the equitable relief sought by the plaintiff below, namely, the establishment of his deed to the property in question, he should pay the sum of money due from his grantor to the appellant, his

PAGES

promise to pay which was the consideration upon which he obtained his said deed.

On behalf of the appellee in the Territorial Supreme Court, application of the principle that he who seeks equity must do equity was resisted upon three grounds, namely:

I. That the suit was not an equitable action, but a statutory one, under the Arizona Statute, which permits a plaintiff to bring his action to quiet title, "and says nothing about the plaintiff being required 'to do equity.'"

II. That the chancery requirement to "do equity" is restricted to the performance of acts "growing out of or necessarily involved in the subject-matter of the controversy," and that the payment by Nugent of the mortgage indebtedness upon the land due appellant was not an act or matter thus involved in the subject-matter of the contract, but was an independent obligation:

III. That the rule, he who seeks equity must do equity, is without application unless the equity to be done is one for the enforcement of which the defendant is entitled to a remedy, in some form, against the complainant.

The opinion of the Territorial Supreme Court adds a further ground, namely:

IV. That the appellant, having acted in the cancellation of his securities, not under a mistake or in the furtherance of any honest purpose, but dishonestly, in the furtherance of a fraudulent purpose, will not be heard in a Court of Equity to claim relief as against his wilful, fraudulent act.

I.

The first of the objections thus urged against the decree of the lower Court, that the appellee's action was a statutory, not an equitable, one, was in effect repudiated by the Supreme Court of Arizona, and is clearly unmaintainable.

BLURRED

The Organic Law of Arizona (Pars. 35-6) provides that the District Courts of the Territory shall "possess chancery as well as common law jurisdiction"; and that "it shall not be necessary in any of the Courts of the Territory to exercise separately the common law and chancery jurisdictions aforesaid in said Courts, and that the several codes and rules of practice adopted in said Territory, in so far as they authorize a mingling of said jurisdictions, or a uniform course of proceeding, in all cases whether legal or equitable, be confirmed."

Apart from this mingling together of common law and chancery jurisdictions, though providing that both shall be maintained, prescribing the form of the application to quiet title, and permitting it to be brought by one out of possession, the statute in no way interferes with the chancery principles which have from time immemorial prevailed in suits to quiet title. The Supreme Territorial Court, accordingly, overruled the contention of the appellee in this respect (Rec., p. 108), in the following language:

> "The action brought being one to quiet title, was one in equity. Such an action has not lost its equitable character by reason of the fact that we have a statute defining and enlarging the original suit in equity. Costello vs. Muheim, — Ariz., ——, —— Pac., ——. It was within the province of the trial Court, therefore, in such cases, to impose such terms upon the plaintiff as a condition precedent to his recovery, as might be just and proper."

The same question has been repeatedly, it is believed uniformly, decided in the same way, under statutes substantially, some of them precisely, like that of Arizona. Costello vs. Muheim, 9 Arizona, 422; Chanler vs. Chanler, 55 Cal., 267; Booth vs. Haskins, 75 Cal., 271; De Cazera vs. Oreana, 80 Cal., 132; Benson vs. Shotwell, 87 Cal., 49; Brandt vs. Thompson, 91 Cal., 458; Sloan vs. Lucas, 79 Pac.

PAGES

(Wash.), 949; Johnston vs. Savings Union, 75 Cal., 134; Wickliffe vs. Owings, 17 How., 47; *in re* Broderick's Will, 21 Wall., 519-20; Holland vs. Challen, 110 U. S., 19, 24; Reynolds vs. Bank, 112 U. S., 405, 410-11; Frost vs. Spitley, 552, 557; Gormley vs. Clark, 134 U. S., 338, 348; Bardon vs. Improvement Co., 157 U. S., 327, 330; Roberts vs. R. R. Co., 158 U. S., 1, 30.

II.

The second contention on behalf of the appellee in the Court below, and which that Court upheld (Rec., pp. 109-10), is, in substance, that the debt from Heyl to Stoffela was an independent debt, not connected with the comparative validity of the titles of Nugent and Stoffela, and that, to bring into exercise the rule in chancery that he who seeks equity must do equity, the defendant must bring forward some corresponding equity growing out of the subject-matter then in suit.

This, in effect, is to say that the duty of Nugent to pay to Stoffela the mortgage indebtedness upon the land in controversy was not one growing out of the subject-matter in suit, but "an independent debt, *not connected* with the question of the relative validity of the titles of Nugent and of Stoffela. Is this conclusion correct? That it is not so is evident upon a number of considerations, of which, it is submitted, the two following are quite sufficient:

In the first place, it was necessary for the complaint or petition of Nugent to show, in order to give him standing for relief in a Court of Equity, that he was a purchaser for value; and he accordingly alleges (Rec., p. 1) that his deed from Mrs. Heyl was "for a valuable consideration to her in hand paid by the plaintiff herein." But, when the case came to proof, this "valuable consideration to her in hand paid" was found to consist, simply, of Nugent's promise to pay this identical, so-called "independent" debt. Unless

paid, he was a mere volunteer. If his petition had set out the truth of the matter, he must have alleged either that he had paid the debt, or that he had offered and was ready and willing to do so, otherwise his petition would have been clearly demurrable. His undertaking to pay the debt to Stoffela was the very consideration of the deed which he sought to have the Court establish, and was the price which he was to pay to his own grantor for the conveyance. How, then, especially in a Court of Equity, which looks through form to substance, can it be said it was an independent debt, not growing out of the subject-matter of the suit, and, therefore, one falling outside of the just and equitable maxim of a court of conscience in question?

So far from being an independent, unconnected matter, with which Stoffela was without connection, he might under the law of Arizona have sustained a suit at law against Nugent to enforce the payment, solely by reason of the privity between them created by Nugent's agreement with Mrs. Heyl to pay the debt. Johns vs. Wilson, 180 U. S., 440.

To state the same doctrine in more detailed and particular terms, "the rule is applied where the adverse equity to be secured or awarded to the defendant grows out of the very controversy before the Court, or out of such transactions as the record shows to be a part of its history, or where it is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges (citations)." Pom. Eq. Jur., Sec. 387; Comstock vs. Johnson, 46 N. Y., 615; Smith vs. Wise, 132 N. Y., 615; Smith vs. Wise, 132 N. Y., 72; Walling vs. Aiken, 1 McMull., 1; Secrest vs. McKenna, 1 Strobh. Eq., 356. And see Pom. Eq. Jur., Sec. 388.

But, in the second place, the connection is unmistakably shown by the record from quite another point of view. Nugent had contracted with Mrs. Heyl for the payment of this debt. His claim is that he is no longer liable to do that duty, because Stoffela has released the debt, and that he is, therefore, entitled to have his deed established without making the payment. But the alleged release by Stoffela (Rec., p. 68) consists, only, of an entry upon the judgment docket in the foreclosure suit, as follows: "This judgment is satisfied *by a deed on file with the papers of the judgment creditor, John Stoffela,* January 9, 1905. Thos. D. Molloy, Clerk."

It is this very deed to John Stoffela of January 9, 1905, which Nugent's suit was brought to have the Court declare null and void. But, if null and void for the one purpose, it must be equally so for the other. He cannot, in any approach to equity or good conscience, claim in the same breath that it should be held void as a cloud upon his title as purchaser, and that it is yet valid in his favor as discharging the debt, justly due Stoffela, which he had solemnly covenanted to pay as the consideration of the grant to him.

In Hoyt vs. Simon, 5 Day, 479, a mortgagee took from the mortgagor an absolute conveyance, in fraud of the latter's creditors. It was urged, on behalf of the creditors in a suit to annul the deed, that the mortgage had been absorbed or merged by the subsequent absolute deed—a recital to which effect on the docket of the foreclosure suit is all there is of the release by appellant claimed in the case at bar (Rec., p. 68). The Court said: "It [the fraudulent deed] can have no effect as to the creditors. Their claim on the property still remains as though the deed did not exist; of course, it can have no effect, by legal inference, to absorb the mortgage debt. They must take the estate as it was before such void deed was given, subject to the mortgage. * * * It [i. e., the contention on behalf of

the creditors] would enlarge the fund of the creditors, which the statute merely meant to protect. It would give effect to a deed, to the advantage of a creditor which the statute, in express terms, as to him makes void."

III.

The third proposition urged on behalf of the appellee in the Court below, and which that Court, we submit erroneously, sustained, is that the equities which must be done or performed by one seeking equity are such, only, as the adverse party has the right, in some form of remedy, to enforce.

This contention, if established, would reduce the application in question to the equity jurisdiction, only, of avoiding circuity of action. If the complainant seeking the enforcement of rights against the defendant is subjected to certain rights which the latter may enforce against him, then he must "do equity," i. e., settle the entire controversy in one suit as the condition of relief; but if the duties which he owes the defendant, however just or binding in conscience, are such as can not be enforced against him in some form of action, then he may have equity without doing equity in turn. The proposition needs but to be stated to show how entirely foreign it is to the principle and considerations upon which the rule of equity in question has been immemorially based.

To take the case of usurious contracts, for example: "In cases of usury, this distinction has been adopted by Courts of Equity. All such contracts being declared void by the statute against usury, Courts of Equity will follow the law in the construction of the statute. If, therefore, the usurer or lender come into a Court of Equity, seeking to enforce the contract, the Court will refuse any assistance and repudiate the contract. But if, on the other hand, the borrower

comes into a Court of Equity seeking relief, the only terms upon which the Court will interfere are, that the plaintiff will pay the defendant what is really and bona fide due to him, deducting the usurious interest, and, if the plaintiff do not make such offer in his bill, the defendant may demur to it, and the bill will be dismissed." Story's Eq. Jur., Sec. 301.

To apply this principle to the case at bar:

Suppose the petition of Nugent, instead of the inaccurate or unfounded statement it contains that Mrs. Heyl conveyed the property to him "for a valuable consideration to her in hand paid by the plaintiff herein," had alleged the true facts, namely: that the consideration for the conveyance was his undertaking to pay to Stoffela the $15,700 which Mrs. Heyl justly owed the latter; that he had been willing to make the payment, but that Stoffela had been unwilling to receive it; that he was now no longer willing or intended to make his stipulated payment of this just debt, but prayed the Court to decree him a valid title to the property without performance by him of his agreement, or the rendition by him of any consideration for the land; would not demurrer have been fatal to such a bill? Would not the Court, even without a demurrer, and of its own motion, have dismissed it? And, if such a bill would not have been maintainable, can a decree to exactly the same consequence and effect prove more so?

In Brown vs. Swann, 10 Pet., 497, the defendant, under the laws of Virginia, could have recovered his principal only, without interest, while in Stanley vs. Gadsby, 10 Pet., 521, arising under the then laws of the District of Columbia, he could have recovered neither property nor interest; but, under the application of the maxim that he who seeks equity must do equity, the bills in both cases were dismissed, because they failed to set forth willingness upon the part of the complainants to pay the principal, with legal

interest, as the condition of relief. To like effect is Spann vs. Hamilton, 1 Wall., 604.

In Stanley vs. Gadsby, the bill alleged usury in a deed of trust and prayed an injunction against sale until the validity of the usurious charges could be determined at law, while the bill contained no offer to pay the principal, with legal interest, and was dismissed on that ground.

Nor is the application of the rule confined to precedents in equity. In Fitzroy vs. Williams, 1 Term., 153, Lord Mansfield refused to allow recovery, in trover, of goods pledged under an usurious agreement, because the plaintiff had not offered to pay the debt with legal interest.

IV.

The final ground in support of the decree below, set forth in the opinion of the Court, is, that the appellant released his securities, not under a mistake or in the furtherance of any honest purpose, but dishonestly, in furtherance of a fraudulent purpose, and that he cannot be heard in a Court of Equity, upon failure of his fraudulent scheme, to claim the same relief from his wilful, fraudulent act that might properly be granted to one in good faith.

This proposition, as applied to the case at bar, we submit, is open to several infirmities, both in fact and law.

In the first place, what is the foundation for the claim that Stoffela's release of his mortgage, or of his foreclosure judgment, was "in the furtherance of a fraudulent purpose"? How was his title to the property to be made better as against Nugent, or the latter's title clouded, embarrassed or otherwise injuriously affected by the release? Whatever may have been the purpose or the motive involved in obtaining the conveyances from Mrs. Heyl to Stoffela, what was the fraudulent purpose, motive or effect of the release by him, after he had obtained those

deeds, of his judgment of foreclosure? We submit there was none.

In the second place, of what, according to the testimony of the witnesses on behalf of Nugent themselves, did the fraudulent conduct of Stoffela in obtaining the conveyances consist? According to them all, he made no secret of the fact that he had been informed of the conveyance to Nugent, but stated that he was, also, informed that Mr. Heyl had not united in the deed, and that it was, therefore, void. If void for that reason, or for any other, Stoffela was entirely within his rights in taking the deeds to himself, and it is impossible to see what fraud there could have been in such action upon his part. The utmost error in the transaction alleged against him, by any of the witnesses in the case, is that, being as the record shows, an unlettered foreigner, he was misinformed or mistaken in regard to the legal necessity, under the laws of Arizona, of a husband joining with a wife in order to make her conveyances valid. Ignorance of the law excuses no one, in so far as the necessary legal consequences of his acts are concerned; but it would be a new and indefensible extension of the maxim to hold that an act done, openly and without concealment, in ignorance or mistake of the law, shall further be treated as a wilful, deliberate fraud, because of which the mistaken party shall be penalized and despoiled, in a court of equity, of property which incontestibly and without dispute is rightfully his.

To the further argument below that, although attempting no concealment of his knowledge in the transaction itself, Stoffela had testified untruthfully about it at the trial, it can be scarcely necessary to make reply. The testimony not only of Stoffela, but of his witnesses, was wholly irreconcilable with that for Nugent. As must occur in all such cases, the Court held the one entitled to greater credence than the other, and reached its conclusions of fact accord-

ingly. Among those conclusions of fact, not even contested then or since, was the finding that Stoffela had a just and valid claim of $15,700, duly secured by mortgage on the land. That either the trial court or the appellate tribunal, deciding adversely to him the issue raised by the pleadings as to which of the two deeds was valid, on the theory that his testimony was not true, should further, without indictment, defense or trial, convict him of false swearing, punish him for it by depriving him of the $15,700 confessedly his due, and present the amount thus taken from him to his successful adversary, can hardly be claimed to be in accordance with legal principles and practice, in either courts of equity or of law.

THE AUTHORITIES CITED IN THE OPINION BELOW.

The authorities, ten in number, cited by the Supreme Court of Arizona (Record, pp. 109-110) as supporting its conclusion that, being found guilty of fraud, the appellant is not entitled to have equity done to him by the appellee as the condition of extending to the latter the relief sought by his bill, may next be briefly examined.

Henry vs. Mayer, 53 Pac., 590, the first of them, presents no question of the application of the maxim that he who seeks equity must do equity, and is not in any other particular pertinent to the question before the Court. In it, a purchaser, seeking to rescind a sale made to him on the ground of alleged fraud upon the part of the vendor, failed of relief because of his failure to prove fraud, but was granted relief against forfeiture for non-payment of the purchase money within the required period, with the privilege of a sale of the property, in lieu of forfeiture, for the unpaid purchase money, if the payments were not fully made by him.

In Neblett vs. MacFarland, 92 U. S., 201, the bill was by a grantor to vacate his conveyance on the ground of fraud on the part of the grantee, the only consideration which had given by the latter being the cancellation of a bond and mortgage of the grantor of which the grantee was holder. Finding the fraud proved, the Court below directed the reconveyance upon terms of the return of the bond and mortgage to the grantee, to be held by him as if there had been no cancellation and otherwise unaffected by the transaction. The grantee appealed to this Court, claiming that the relief granted should have been conditioned, not upon restoring the parties to their former status, but upon payment to him, in money, of the amount of the bond. This Court, finding that the appellant had been restored to the property which he parted with in consideration of the deed, held, not that he was not entitled to, but that he had had the benefit of the equity maxim in question, the existence and binding effect of which it fully recognized. "Whether good or bad, he receives now the same security that he then gave to his vendor. * * * It is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction," the opinion concluding with the language quoted by the Court below, at page 109 of the record. Read in its application to its facts (Cohens vs. Virginia, 6 Wheat., 264, 399; Harriman vs. Northern Securities Co., 197 U. S., 244, 291; Karrick vs. Wetmore, 205 U. S., 141, 155) and the relief granted in it, the case is authority for the correctness of the decree of the trial court, and affords no support for the reversal of that decree.

Guckensheimer vs. Angevine, 81 N. Y., 394, is even more remote, being, not a suit in equity at all, but an action at law to recover the value of certain whiskey fraudulently purchased of the plaintiff and sold to the defendant, who, with notice of the fraud, had paid a Government tax in order to get possession of it.

Masson vs. Bovet, 1 Den., 169, was, also, an action at law, in replevin, to recover a promissory note obtained from the plaintiff in the fradulent sale to him of certain lands; and, even in this action at law, the Court said:

> "The party who would disaffirm a fraudulent contract must return whatever he has received under it. This is now a plain and just principle. He can not hold on to such part of the contract as may be desirable on his part, and avoid the residue, but must rescind *in toto* if at all. * * * It is not exacted on account of any feeling of partiality or regard for the fraudulent party,"

Immediately following which language occurs the extract quoted by the Court below, "The law cares very little what his loss may be, and exacts nothing for his sake," followed by the further statement, "If, therefore, he has so entangled himself in the meshes of his own knavish plot *that the party defrauded can not unloose him,* the fraud is his own and the law only requires the injured party to restore what he has received, *so far as he can undo what had been done in the execution of the contract.*" In the case at bar, as has been heretofore pointed out, the appellee is seeking to have the deed of January 9th to appellant declared null and void, to the end that his title under his deed of July 4th may be established and, at the same time, to have it held valid and effectual for the purpose of treating the reference to it on the docket of the foreclosure suit as a release of the mortgage and thereby to relieve himself from payment of the consideration upon which he obtained his deed. He never was in any manner defrauded by the release of the mortgage, but seeks to use it to defraud the appellant of the $15,700 which he contracted to pay him, as the consideration for his title to the land, and without which payment he can have no just or honest title to the latter.

Davis vs. Leopold, 87 N. Y., 620, was a bill by creditors to vacate a deed from a husband to his wife in fraud of them, and in which the Court held the complainants entitled to the relief prayed without refunding to the wife the consideration paid by her to the husband. The payment being, not to the creditors, but to the husband, in fraud of their rights, and in no way enuring to their benefit, it is difficult to see what equity there was due from them to her in the premises, or what is the application of that case to the one at bar.

Three others of the cited cases, namely, Lynch vs. Burt, 132 Fed., 417, 432; Burt vs. Gatzian, 102 Fed., 937, and Sands vs. Codwise, 4 Johns., 536, 578-9, 598, are of like character, to the effect that the fraudulent grantee in a conveyance to hinder, delay and defraud creditors has no equity as against the latter for purchase money paid by him for the land so conveyed.

So, in Boyd vs. Dunlop, 4 Johns. Ch., 482, the Court, refusing the relief because the charge of fraud was not sufficiently made out, remarked, obiter:

> "A deed, fraudulent in fact, is absolutely void and is not permitted to stand as security for any purpose of reimbursement or indemnity."

As no question is presented in the case at bar of having a fraudulent deed stand as security for such a purpose, the citation would seem to be not in point.

Of R. R. Co. vs. Soulter, 13 Wall., 517, it is sufficient for present purposes to observe that the wrongdoers were, themselves, the complainants in the suit, seeking by their bill, as a matter of affirmative relief, that they might be indemnified for moneys paid for the benefit of the property between their fraudulent purchase and the annulment of it, on the application of creditors, as fraudulent.

No one of the cases cited in the opinion of the learned court below, it will accordingly be seen, supports the doctrine that, if a defendant against whom equitable relief is sought is justly chargeable with fraud, the principle that he who seeks equity must do equity is without application to him. In the several cases of suits by creditors to set aside fraudulent conveyances, there were no equities in favor of the fraudulent grantees; while in each of the remaining citations in which the equitable doctrine in question was in any manner referred to, it was recognized and applied.

That the maxim "He who seeks equity must do equity" is applied in favor of a defendant who has been guilty of fraud, provided there are equities in his favor, admits of no question, under the authorities. It is usually to accord to just such defendants the rights which, notwithstanding their conduct, are nevertheless equitably and honestly theirs, that it is called into exercise by the courts.

The opinion of the learned court below, it is believed, is the only decision supporting the opposing doctrine. The cases in which the principle has been denied, "are all cases where the fraudulent trustee was asking for the active interference of some court for his protection, or for reimbursement for improvements, for money paid by him in pursuance of the fraudulent arrangement with his grantor, or to discharge encumbrances, or to secure to him the payment of a debt due to him from the fraudulent grantor, or where he was compelled to account for profits which he had actually made or could have made out of the property fraudulently conveyed; and the equitable rule was enforced that 'he who hath committed inequity shall not have equity,' which is merely another way of saying that 'one who comes into equity seeking it, must come with clean hands.'" Loose vs. Wilkinson, 13 N. Y., 485.

"This Court, on its equity side, is 'capable of imposing its own terms on the party to whom it grants relief.' (Citation.) And it will not grant relief, even in fraud, unless the party 'wishing it will do complete justice.'" Marshall, C. J., in Veazie vs. Williams, 8 How., 134, 161.

"Courts of equity never interfere to deprive the plaintiff at law of any legal advantage which he may have secured, unless the party seeking relief will do complete justice by paying whatever is really due. They have (upon the same principle) gone so far as to refuse their assistance in relieving against a judgment obtained by fraud." Payne vs. Dudley, 1 Wash., 196-9, cited with approval in Veazie vs. Williams, *supra.*

Carlton vs. Hewlett, 49 Minn., 308, 320, is a case quite like the present in all substantial features. The secret holder of a first mortgage fraudulently obtained a second in a larger amount, agreeing to pay the prior encumbrances and taxes, under which second mortgage he acquired title by foreclosure. On a bill attacking the second mortgage as having been obtained fraudulently, the lower court passed a decree substantially similar to that of the Supreme Court of Arizona in the present case, decreeing the mortgage and all proceedings under it void, and that the plaintiff was the owner of the property described in it. This was reversed on appeal, the Supreme Court saying:

"The maxim to be ordinarily applied suggests itself, 'He who seeks equity must do equity.' * * * By the single conclusion of law appended to the findings of fact, judgment was ordered in plaintiff's favor, wiping out of existence, without terms or conditions, defendant's mortgage security and the foreclosure proceedings, with all record thereof. The entry of so sweeping a judgment would be most unfair and in-

equitable. The conclusion of law must, in any event, be modified or amended so as to impose equitable terms upon the plaintiff in respect to the sum of money which constituted a part of the mortgage debt."

"This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence so far as it is concerned with the administration of equitable remedies." 1 Pom. Eq. Jur., Sec. 388; Chaney vs. Coleman, 77 Tex., 100; Ins. Co. vs. Brown, 30 N. J. Eq., 193-9; Corby vs. Bean, 44 Mo., 379-81. See, also, Buena Vista Co. vs. Tuohy, 107 Cal., 243, 253.

The principle relied upon by appellant is, however, so elementary and so well established that it is deemed inappropriate to cite further authorities in support of it.

One point of contention in the court below was, that the appellant was not entitled to the benefit of the condition imposed by the judgment of the trial court because he had not filed a cross bill or other pleading seeking it. This, however, was an error both of fact and of law. Appellant (Record 20) filed a cross complaint, praying, among other things, "for such other and further relief as may be just and equitable, and for all proper orders"; while the rule is well settled that "no cross bill is requisite to the application of the maxim that he who seeks equity must do equity." Trust Co. vs. R. R. Co., 126 Fed., 46. No instance has been found in which a cross bill for the purpose has been held necessary, or consistent with the principle of the rule which denies the relief when the party at fault is the actor or complainant.

It will be noted that the trial court allowed the appellee's testator fifty days from the date of judgment, which was May 15, 1905, within which to pay to appellant the amount of the mortgage, "without interest," and that the appellant, though acquiescing in the judgment, has been denied the

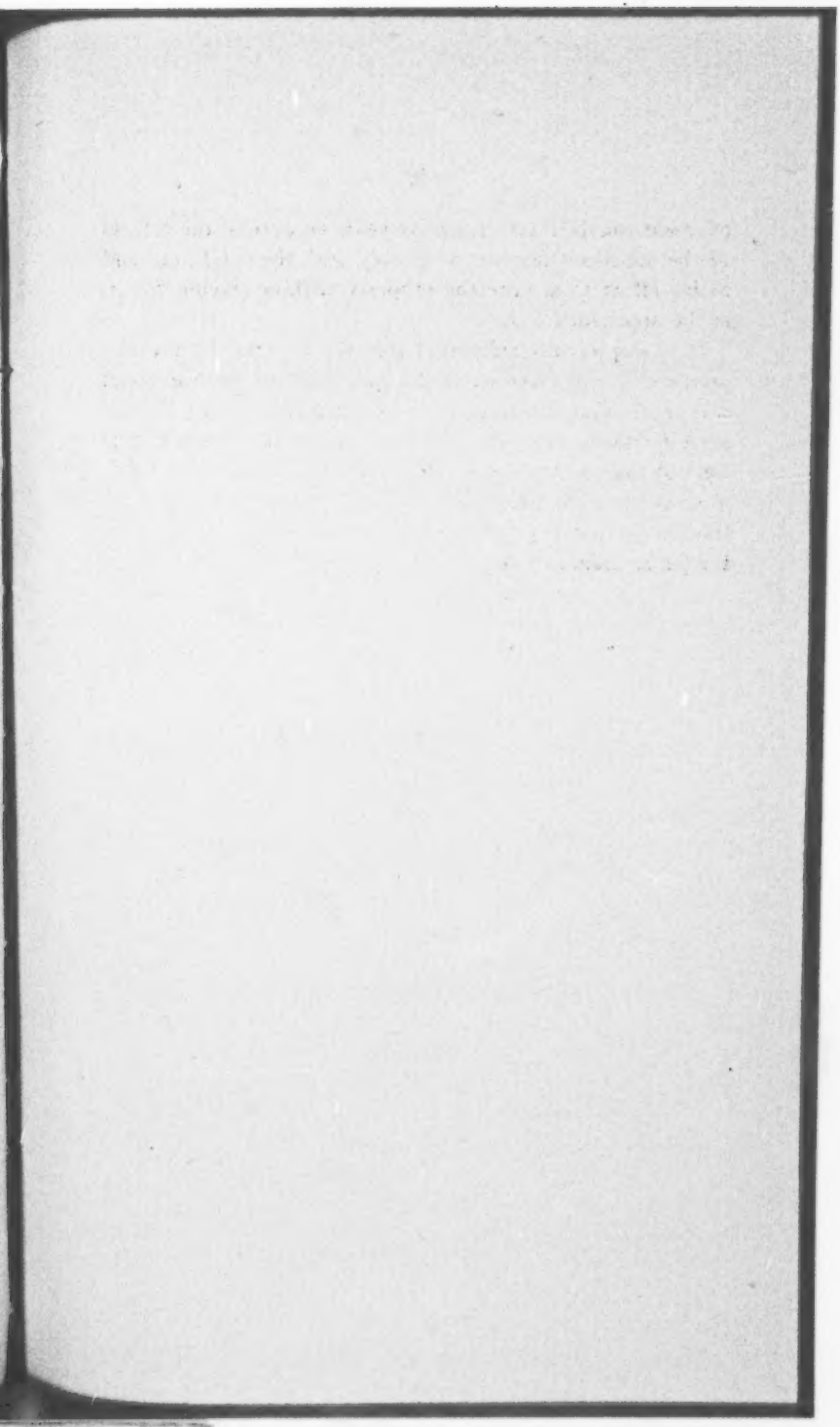
payment for the intervening five years because of the refusal of the appellee's testator to comply with the condition, and of his effort to acquire the property without paying for it, at the appellant's cost.

It is respectfully submitted that the reversal by the Supreme Court of Arizona of the judgment of the trial court was error; that the judgment of the Supreme Court of Arizona should be reversed, and that, in granting leave at this time to take advantage of the judgment of May 15, 1905, interest upon the mortgage should be allowed appellant, at least from the expiration of the fifty days allowed in it for performance of the condition required.

Respectfully submitted,

J. J. DARLINGTON,
Attorney for Appellant.

DARK PAGE



LEED THRU

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 179.

JOHN STOFFELA,
Appellant,

vs.

MARY NUGENT, EXECUTRIX,
Appellee.

MEMORANDA IN REPLY.

Pursuant to leave granted at the hearing of the above cause to file a memorandum of authorities in reply to the brief for appellee, the following is respectfully submitted:

That, under the statutes of Arizona, all papers filed in the cause, including depositions and exhibits, constitute the record of the case, and that, although this Court will not review the findings of fact of the court below, it may and will

examine the entire record for the purpose of arriving at the merits of the case, see Crowe vs. Trickey, 204 U. S., 228.

The doctrine of Daisy Roller Mills vs. Ward, 6 N. D., 317, and Morley Bros. vs. Stringer, 133 Mich., 690, if of importance in the case at bar, is not in accord with the weight of authority. Clements vs. Moore, 6 Wall., 299; Chatterton vs. Mason, 86 Md., 236, 247; Neel vs. Corson, 47 Ark., 421, 430; Bank vs. Halstead, 134 N. Y., 520, 522-4; Baldwin vs. June, 68 Hun., 284, 286-7.

In Clements vs. Moore, the grantee in a bill of sale intended to hinder, delay and defraud creditors, with knowledge, was held entitled to be credited with so much of the purchase money as the fraudulent grantor applied to payment of his debts, and to be liable, only, for the $1,500 not so applied.

J. J. DARLINGTON,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 179.

JOHN STOFFELA,
Appellant,

vs.

MARY E. NUGENT, as executrix of the Last Will and Testament of M. J. Nugent, deceased,
Appellee.

BRIEF OF APPELLEE.

Statement of the Case.

The facts are fully set forth in the findings of fact made by the Territorial District Court, upon which the cause was reviewed by the Supreme Court of the Territory. These findings are set forth on pages 22, 23 and 24 of the transcript of record, and may be summarized as follows :

On January 4th, 1905, and for a long time prior thereto, Magdalena C. Heyl was the owner and in possession of Lot 1, in block 21, and lot 4 in block 15, in the town of Yuma, Yuma County, Arizona. These lots were the separate and individual property of Mrs. Heyl. On January 4th, 1905, Mrs. Heyl, by good and sufficient deed, conveyed the lots to M. J. Nugent. Prior to the execution of this deed, Mrs. Heyl had given to the appellant Stoffela, two mortgages upon these lots ; suit to fore-

close these mortgages had been brought and decree of foreclosure entered, and the lots had been advertised for sale by the Sheriff of Yuma County, the sale to take place on January 10th, 1905. The amount due on the two mortgages was $15,700 and interest. In consideration of the deed given him by Mrs. Heyl, Nugent agreed that he would procure the mortgage and judgment liens held by Stoffela to be satisfied (Finding VII.). But it is not found, nor is it a fact, as suggested in appellant's brief that such agreement was all the consideration which Nugent gave. It is elsewhere found that the deed was given for a valuable consideration (Finding II.).

On January 9th, 1905, Mrs. Heyl executed and delivered to Stoffela a deed, in which the consideration was recited as $10,000, conveying to him lot 4 in block 15, and a mortgage for $5,700 upon lot 1 in block 21. These instruments were recorded in the office of the proper recording officer of Yuma County on the same day, and prior to the recording of the deed previously given to Nugent.

Pursuant to his agreement with Mrs. Heyl, Nugent endeavored in good faith to pay off and discharge the mortgages and judgment held by Stoffela, and offered to do so, but Stoffela, "acting in bad faith with intent to prevent the acquisition by the said Nugent of title to the said property" (Finding VII.), evaded the payment by Nugent of these amounts and procured the deed and mortgage so given by Mrs. Heyl to himself.

On January 9th, 1905, Stoffela "voluntarily and of his own motion, and not at the instance of the plaintiff or of any one acting in his behalf, and not by mistake or inadvertence, but deliberately and in bad faith with intent fraudulently to defeat the title of said Nugent in and to the said property under the said deed from the said Heyl and to procure and effectuate title in himself to the said property, did satisfy of record the said mortgage and the said judgment liens" (Finding IX.). On January 5th, 1905, Stoffela had full and complete notice of the deed given by Mrs. Heyl to Nugent. Stoffela's contention was that he had no notice of the deed to Nugent until after he had received his deed and canceled the judgment and mortgage.

Shortly after these transactions, Nugent brought this suit to quiet his title to the two lots and to have cancelled the

deed and mortgage given by Mrs. Heyl to Stoffela. The trial resulted in a decree quieting Nugent's title to the property and cancelling and adjudging void the deed and mortgage to Stoffela, but upon condition that Nugent should, on or before the 4th day of July, 1905, pay to Stoffela the sum of $15,700 less attorneys fees and costs. From this judgment Nugent alone appealed to the Supreme Court of Arizona. That court, upon the facts as found by the District Court, held that it was error to impose this condition, and reversed the decree and remanded the cause, with directions to enter a decree quieting Nugent's title unconditionally. From the judgment of the Supreme Court of the Territory, Stoffela has appealed to this court.

Argument.

Preliminary to a discussion of the questions of law involved, it may be proper to consider what matters are before this court.

The appeal to the Supreme Court of the Territory was by the plaintiff alone. His appeal was based wholly upon the findings of fact made by the District Court, his contention being that upon those facts, the Court erred in imposing conditions upon which he might have the relief to which he was held entitled. He sought only an unconditional judgment in his favor. The evidence was not before the Supreme Court, and the only question presented was, to use the language of the opening paragraph of the opinion of the Supreme Court, "whether the conclusions of law and the judgment entered thereon are supported by the findings." The testimony given on the trial of the cause is printed in full in the transcript. While it shows that the findings of fact made by the trial Court were amply sustained, it is insisted that it has no place in the record and should not be considered. No errors in the admission or rejection of evidence were claimed in the Supreme Court of the Territory, nor does the appellant present any such question by his assignments of error in this Court. The findings of fact were not excepted to by Stoffela,

nor did he appeal from the original judgment, and, as appears from his assignments of error in this Court, he seeks only the restoration of the original decree with the condition attached.

Aside from the familiar rule that the jurisdiction of this Court, on appeal from the Supreme Court of a Territory, is limited to questions of the admission or rejection of evidence where such were claimed in the Court below, and to determining whether the findings of fact support the judgment,

Harrison vs. Perea, 168 U. S., 311,
Young vs. Amy, 171 U. S., 179,
Crowe vs. Trickey, 204 U. S., 228,

it is obvious that this Court may only review such matters as were presented to the Court below, and act only upon the record on which that Court based its decision. As expressed by Mr. Justice McKenna, in a recent opinion, "as our review in the nature of things, is confined to determining whether the Court below erred, it follows that our reviewing power under the circumstances is coincident with the authority to review possessed by the Court below."

Shawnee Compress Co. vs. Anderson, 209 U. S., 423.

On appeal from the Supreme Court of a Territory, the inquiry is only in relation to the matters presented to and reviewed by the Supreme Court of the Territory.

Montana Railway Co. vs. Warren, 137 U. S., 348.

Limiting the inquiry in this Court, therefore, to the question whether the findings of fact justified the judgment, there are two reasons why the Supreme Court of Arizona rightly eliminated the condition imposed by the trial court.

1. The indebtedness due from Heyl to Stoffela, which Nugent was required to pay as a condition precedent to having his title quieted, did not grow out of nor was it necessarily connected with the subject matter of the controversy. The subject matter of the controversy in this action was the comparative validity of the two claims of title, and the debt was an independent matter and not the proper subject for the imposition of terms. Stoffela's act cancelling the judgment and mortgage was an independent transaction on his part in furtherance of a fraudulent purpose to secure the property.

The maxim that he who seeks equity must do equity only applies when the relief sought by the plaintiff and the right demanded by the defendant belong to or grow out of the same transaction. It has no application where the demand of the defendant is based upon a contract separate and distinct from that which forms the subject of the plaintiff's action.

Mahoney vs. Bostwick, 96 Cal,, 53.
I. Pomeroy's Eq. Jur., Secs. 385–387.
Otis vs. Gregory, 111 Ind., 504.

On this subject but little can be added to the opinion of the Court below. As there said, " the debt from Heyl to Stoffela was an independent debt, not connected with the comparative validity of the titles to Nugent and Stoffela. To decree that Nugent should pay such debt as a condition precedent to the establishment of his title, would not restore any state of affairs that had formerly existed between the parties. It would restore Stoffela to a position perhaps even better than the one he was in before he entered upon his independent fraudulent scheme."

2. A court of equity will not relieve Stoffela from the situation in which he has placed himself by his fraudulent conduct.

The findings of fact made by the trial Court show that Stoffela satisfied and discharged his mortgage and judgment liens for the purpose of carrying out a fraudulent scheme to deprive Nugent of title to the property and secure title in himself. Actual fraud is found in language as strong as could be used, without departing from the dignity of judicial utterance ; good faith, accident, mistake and ignorance are expressly negatived.

By satisfying and discharging these liens he sought to prevent Nugent from paying them, and prevented the foreclosure sale from which Nugent might have redeemed. Had his fraudulent scheme succeeded, the means he adopted would have effectually deprived Nugent of all interest in the property. It failed, because the Court found that he had actual notice of Nugent's deed. Having failed in his fraudulent purpose, equity will leave him where it finds him, and not relieve him from consequences of his fraud.

" He who appeals to equity for relief from a position in which his own fraud has placed him must ever fail. Equity

will leave him where it finds him, irrespective of the financial results to himself."

Daisy Roller Mills vs. Ward, 6 N. D., 317; 70 N. W., 271.

"Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."

Neblett vs. McFarland, 92 U. S., 101.

Language as vigorous might be quoted from numerous decisions. Wherever the question has arisen, the principle has been rigorously applied, and parties guilty of actual fraud have been denied relief, no matter how disastrous the situation in which they had placed themselves.

Guckenheimer vs. Angevine, 81 N. Y., 394.
Davis vs. Leopold, 87 N. Y., 620.
Railroad Co. vs. Soutter, 13 Wall., 517.
Lynch vs. Burt, 132 Fed., 417.
Burt vs. Gotzian, 102 Fed., 937.
Sands vs. Codwise, 4 Johns., 536–598.

The situation of the appellant is not, in principle, different from the cases in which a grantee under a deed given to defraud the creditors of the grantor has voluntarily paid off incumbrances upon the granted property. In such case his fraudulent conduct precludes him from being reimbursed for such expenditures.

Daisy Roller Mills vs. Ward, *supra*.
Morley Bros. vs. Stringer, 133 Mich., 690, 95 N. W., 978.

It is said that it is difficult to see how Stoffela could have been guilty of fraud in discharging his own judgment and mortgage liens. It must be borne in mind, however, that Stoffela's mortgages had been foreclosed, sale ordered, and notice of sale given, and the sale advertised for the following day. But for the satisfaction of the liens, the sale would have taken place, and, under the statutes of Arizona, Nugent, as the

grantee of the mortgagors, could have redeemed from the sales within six months. However successfully Stoffela may have evaded payment to him of the amount of these liens, redemption from the sale could not have been evaded, for it could have been made by payment to the sheriff. Obviously the first and most essential step in the consummation of Stoffela's fraudulent scheme to defeat Nugent's title was to prevent the sale, and this would be effectually done by satisfying of record the judgments on which the sale was based. In his answer, Stoffela alleged, under oath, that he had no notice of the deed to Nugent prior to the recording of his own deed and mortgage. If he had succeeded in establishing this by proof, it would have been the final step, of which the discharge of his judgments was the first, in establishing his own title and defeating Nugent's.

Furthermore, if this Court despite our contention should consider the evidence, it appears therefrom that Stoffela's real purpose was to obtain the property for less than its actual value, and to frustrate Nugent's benevolent design to save it from sacrifice.

The case presented by the findings is simply that Stoffela entered into a fraudulent scheme to secure the property for himself for the amount of the mortgage indebtedness. For the purpose of carrying out this fraudulent scheme and preventing Nugent from paying off the incumbrances, he voluntarily satisfied his liens of record. If one may enter into such a fraudulent scheme to obtain property with certainty that if his fraud is successful he will obtain the property, and that if unsuccessful a court of equity will restore him to all that he has lost, he is not likely to refrain from fraud. With everything to gain by fraud and a court of equity to see that he loses nothing, the evil doer could safely pursue his fraudulent course, secure in the certainty that his only loss would be what he failed to gain because his scheme was unsuccessful.

The true rule, sanctioned by all courts before whom the question has come is expressed in the homely language of the Supreme Court of Michigan, that "in such cases the courts will leave parties to lie in the beds they have voluntarily made."

Morley vs. Stringer, *supra.*

The argument that Nugent's conduct was inequitable and the assumption that each party was endeavoring to obtain an unfair advantage over the other, ignores the facts as found by the trial court. Absolute good faith on the part of Nugent, and absolute bad faith and fraudulent intent on the part of Stoffela are found in unmistakable language. Nugent did nothing to induce Stoffela to satisfy his judgments. He was ready and willing to pay them and in good faith tried to do so, but was prevented by Stoffela's evading payment. Meanwhile Stoffela, not in good faith nor even foolishly as suggested by counsel, but with fraudulent intent, effectually prevented payment by discharging his judgments of record, after having obtained a deed and mortgage which he had placed of record before the recording of Nugent's deed. Had the court found that he had no actual notice of Nugent's deed, his fraudulent scheme would have been carried to a successful issue. The court found, however, that he had actual notice, and thus his fraudulent scheme was defeated, and as a result of his unsuccessful fraud Stoffela found himself in the difficulty from which the Supreme Court of the Territory declined to extricate him. Nugent's conduct was no more inequitable than that of the complainants in the cases cited where, in suits to set aside transfers fraudulent as to creditors, the fraudulent grantee was refused reimbursement for moneys expended in paying liens on the property.

Stoffela's contention is in effect a suit to set aside the cancellation of his judgments and mortgage, and his rights, if any, rest upon his cross-complaint. It is obvious, and counsel virtually concede, that under the findings no court of equity may respond to the prayer of his complaint.

It is respectfully submitted that the judgment of the Supreme Court of Arizona should be affirmed.

Tucson, Arizona, March 28th, 1910.

EUGENE S. IVES,
Attorney for Appellee.

OPINION

STOFFELA *v.* NUGENT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 179. Argued April 28, 1910.—Decided May 16, 1910.

One committing a fraud does not become an outlaw and *caput lupinum*.

Although one by reason of fraud may have no standing to rescind his transaction, if it is rescinded by one having the right to do so the court should do such justice as is consistent with adherence to law.

Although one holding a mortgage may have fraudulently endeavored to prevent another from acquiring the fee of the property, he may still be entitled to have his mortgage paid if the other finally gets the property.

Deeds and discharges of mortgages although different instruments may be parts of one transaction; and one setting aside the deed may also be required to give up the discharge so as to restore other parties to the condition in which they stood prior to the transaction.

18 Arizona, 151, reversed

THE facts are stated in the opinion.

Mr. J. J. Darlington, with whom *Mr. John J. Hawkins* and *Mr. Thomas Armstrong, Jr.*, were on the brief, for appellants.

Mr. Eugene S. Ives for appellee submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a complaint in the nature of a bill in equity brought by the appellee, Nugent, to set aside a deed and mortgage as a cloud upon his title to certain land. The defendant denied the allegations of the complaint and filed a cross-complaint to set aside the deed to the plaintiff. The case was tried before a judge without a jury and he made findings of fact of which the following is an abridged statement. The land was subject to two mortgages held by the defendant, upon which a judgment of foreclosure had been rendered, the sum due being $15,700 and interest. Mrs. Heyl, the mortgagor and owner of the equity, sold and conveyed the land to Nugent on January 4, 1905, he agreeing to procure the payment of the mortgage and judgment liens. On January 9, the day before that fixed for the mortgage sale, the defendant, having knowledge of the conveyance to Nugent, and having evaded Nugent's efforts to pay the mortgage debt, induced Mrs. Heyl to convey a part of the premises to him absolutely in satisfaction of $10,000, and to mortgage the residue for $5,700, and recorded the deeds before Nugent had recorded the deed to him. He also, with fraudulent intent to defeat Nugent's title, it is said, although the possibility is hard to conceive, satisfied of record the former mortgages and judgment liens, the only consideration for his act being the later deed and mortgage given by Mrs. Heyl. On these facts judgment was given for the plaintiff, conditioned upon his paying to the defendant $15,700 without interest, less $600 counsel fees and costs. The plaintiff appealed and the Supreme Court of the Territory gave the plaintiff an unconditional judgment; on the ground that

the defendant's conduct was voluntary, in pursuance of his fraudulent scheme, and that he had no claim as against Nugent to be relieved from the consequences of a collateral act. It was thought that the debt from Mrs. Heyl to Stoffela was a matter with which Nugent, in spite of his covenant to pay it, had no concern, the only question being the relative validity of the plaintiff's and defendant's titles. The defendant appealed to this court.

We are of opinion that the judgment appealed from was wrong, and that the judgment of the court of first instance should be affirmed. It is true that the defendant acted fraudulently and knew what he was about. But a man by committing a fraud does not become an outlaw and *caput lupinum*. *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425. He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so the courts will endeavor to do substantial justice so far as is consistent with adherence to law. See *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 150. If Nugent is allowed to have the land free of all charge and the defendant's claim is extinguished, Nugent gets much more than he bargained for and the defendant is deprived of his equitable interest in Nugent's covenant to pay the mortgage debt (*Johns* v. *Wilson*, 180 U. S. 440), and is made to lose a large sum rightly due to him, not from any necessity of justice, but simply because he has acted badly and therefore any treatment is good enough for him. It is said that the discharge of the old mortgages was a collateral matter with which Nugent had no concern. If that were true, still justice might forbid Nugent to rely upon it. But it is not correct. The discharge and the new deeds, although different instruments, were parts of one transaction. Each was consideration for the other. As the plaintiff elects to do away with the consideration for the discharge, he must be taken to elect also to give up the discharge, or, to put it in another way, he must restore the defendant to the condition in which he stood before the re-

scinded deeds were made. The defendant's rights were cut down at least sufficiently by the trial court.

Judgment reversed, with directions to affirm the judgment of the District Court.